

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
November 17, 2004 Session

**STATE OF TENNESSEE v. PAUL DENNIS REID, JR.**

**Criminal Court for Davidson County  
No. 97-C-1836**

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**No. M2003-00539-CCA-R3-DD - Filed June 3, 2005**

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Defendant Paul Dennis Reid, Jr., was found guilty by a jury of three counts of premeditated murder, three counts of felony murder, one count of attempted murder, and one count of especially aggravated robbery. The felony murder convictions were merged into the premeditated murder convictions. Thereafter, the jury sentenced Defendant to death based upon the finding of four aggravating circumstances: the defendant had previously been convicted of one or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person; the murders were committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of defendant or another; the murder was knowingly committed, solicited, directed or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit robbery; and the defendant committed "mass murder," which was defined at the time of the commission of these offenses as the murder of three or more persons within the State of Tennessee within a period of forty-eight months, and perpetrated in a similar fashion in a common scheme or plan. Tenn. Code Ann. § 39-13-204(i)(2), (6), (7), and (12)(Supp. 1996). The trial court sentenced Defendant to 25 years imprisonment for the attempted murder conviction and 25 years imprisonment for the especially aggravated robbery conviction, to be served consecutively to each other and to Defendant's other non-death sentences. On appeal, Defendant presents forty-seven issues. We affirm Defendant's convictions and sentences.

**Tenn. R. App. P. 3 Appeal as of Right;  
Judgment of the Criminal Court for Davidson County Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined

Thomas F. Bloom and James A. Simmons, Nashville, Tennessee, for the appellant, Paul Dennis Reid, Jr.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Angele M. Gregory, Assistant Attorney General, for the appellee, State of Tennessee

## **OPINION**

### **SUMMARY OF FACTS**

On March 23, 1997, Ronald Santiago, Andrea Brown, Robert Sewell, and Jose Ramirez Gonzales had worked the night shift at a McDonald's restaurant on Lebanon Road in Nashville. Around midnight, Robert Sewell and Jose Gonzales exited the restaurant after work to enter their cars to go home. Robert Sewell exited first, with Jose Gonzales following after him. Jose Gonzales said goodnight to manager Ronald Santiago, who was standing in the doorway of the restaurant. As Sewell and Gonzales walked into the parking lot, they saw a man approaching them with a bag under his arm and a gun in his hand. The man said something to the men, and Ronald Santiago explained to Gonzales, who could speak and understand only limited English, that the man ordered them to return to the restaurant. All three of the men followed the orders and went back into the restaurant, where Andrea Brown had remained. Once inside, the man forced them into the office area where he demanded the money from the restaurant's safe. Manager Santiago complied with the man's request and gave the man the money from the safe. Next, the man ordered the employees into the storeroom, where he forced them to lie down. Again, the employees complied with the request. The man then walked over to Ronald Santiago and shot him twice in the head. Andrea Brown and Robert Sewell were shot in similar style. However, when the man approached Jose Gonzales, the gun would not fire. Gonzales made an attempt to fight with the man, but he was overpowered. The man then took out a knife and repeatedly stabbed Gonzales. After the perpetrator left the restaurant, Gonzales was able to crawl to a phone and call for help. Ronald Santiago and Robert Sewell were found dead at the scene. Andrea Brown and Jose Gonzales were taken to the hospital, where Brown later died. During his lengthy recovery process, Gonzales was able to assist the police in identifying Defendant Paul Dennis Reid, Jr. as the man who murdered his fellow employees and attempted to murder him on March 23, 1997. Defendant was arrested and charged with the murders of Santiago, Brown, and Sewell, the attempted murder of Gonzales, and the especially aggravated robbery of Santiago. Prior to the trial in this case, Defendant was convicted of committing similar acts of robbery and murder at a Captain D's restaurant in Nashville and a Baskin Robbins restaurant in Clarksville. The Tennessee Supreme Court has upheld the convictions and death sentences of Defendant in each of those cases.

### **PROOF**

#### **Competency Phase**

On March 13, 2000, the trial court began a competency hearing in this case. Defendant had raised the issue of competency at his trial for the Baskin-Robbins murders in Clarksville approximately one year prior, but he had been found to be competent. Defendant had not raised the issue of competency at his previous Davidson County trial. However, experts had testified on Defendant's behalf during the penalty phase of the Captain D's trial. Judge Cheryl Blackburn, who presided over the previous Davidson County trial, was also assigned to this trial. The court advised it would take judicial notice of the expert testimony that had been admitted during the penalty phase

of the Captain D's trial. Further, the court advised that it had reviewed the testimony from Defendant's prior competency hearing in Clarksville; therefore, the proof at this hearing should be limited only to Defendant's current competency. Dr. Pamela Auble, Dr. Mary Ann Hea, Reverend Joe Ingle, and Dr. James Kyne testified on behalf of the defense. The defense moved to admit the testimony of Dr. Xavier Amador, who had testified on behalf of the defense at the Clarksville Baskin-Robbins trial. However, the court denied the request and advised that state funds would not be provided for Dr. Amador to evaluate Defendant or to testify at the competency hearing. Thereafter, the defense submitted the curriculum vitae of Dr. Amador, a letter to the court authored by Dr. Amador, and the evaluation and transcript from Dr. Amador's testimony at the Baskin-Robbins trial, as an offer of proof. The State presented the testimony of Dr. Daniel Martell. Dr. Keith Caruso testified as an independent expert appointed by the trial court. Additionally, Dr. Samuel Craddock, Dr. Rokaya Farooque, and Rebecca Smith testified as to their evaluation of Defendant at the Middle Tennessee Mental Health Institute, which was performed at the request of the trial court.

Dr. Pamela Auble, a psychologist specializing in neuropsychology, first examined Defendant during Defendant's Captain D's trial. Dr. Auble's first interview of Defendant was at the request of defense counsel following Defendant's decision not to present any mitigating proof at the sentencing hearing of the Captain D's trial. Defendant advised her in that interview that there was no reason to present any mitigating proof because the outcome of the sentencing hearing had been predetermined. In the end, however, Defendant allowed mitigating evidence to be presented; therefore, she was not called upon to testify as to his competency.

Dr. Auble also examined Defendant in connection with the Baskin-Robbins murders in Clarksville and testified at the competency hearing in that case that Defendant was incompetent to stand trial. At the Clarksville hearing, Dr. Auble opined that Defendant had four problems in terms of his competency. First, he suffers from delusions – delusions of surveillance, monitoring, and control by the government. She explained that following his first trial, Defendant's attorneys had become a part of the delusions. He believed that his attorneys had no free will; they were merely acting out a part of the plot to kill him. Second, Defendant has difficulty conceptualizing. He focuses on irrelevant details. She opined that this problem stems from a brain injury he had previously suffered. Dr. Auble testified that Defendant had suffered multiple head injuries during his life. She related that he was unfocused and rambling, concentrating on irrelevant topics, which made it difficult for him to assist in his own defense. Third, Defendant suffers from anosognosia, which is a condition in which mentally ill persons will go to pathological lengths to conceal their mental illness in an attempt to appear normal. Dr. Auble testified that Defendant had a very strong desire to appear normal. As a result, Defendant did not want to present mitigating evidence. Dr. Auble explained that anosognosia is caused by neurological damage, often in the right hemisphere of the brain. This damage, she testified, could have been caused by a head injury Defendant received as a child. Fourth, Defendant had an increasing distrust of his attorneys. Defendant, therefore, avoided discussing his case with his attorneys.

At the competency hearing in this case, Dr. Auble reiterated much of her testimony from the Clarksville hearing. Dr. Auble explained that Defendant has a distrust of his attorneys and the government. As she testified at the Clarksville hearing, Defendant believes that a conspiracy against him exists. Specifically, Defendant believes that the government caused him to be in a car accident in November 1990, the government bombed the Murrah building on April 19, 1995, in Oklahoma City where he was scheduled to have an appointment, and the government is framing him for capital murder. Dr. Auble testified that Defendant's conspiracy beliefs have worsened over time. Defendant now believes that his attorneys, the judges, and the police are all involved in the plot to frame him for murder and have him sentenced to death. Defendant further believes that an inmate has been planted on death row as a part of the plot.

At the competency hearing in the case *sub judice*, Dr. Auble again testified that Defendant suffered from anosognosia. Further, she testified that his delusions have worsened and he had become focused on minor details. As an example, she testified that when his defense attorneys met with him, he did not want to discuss his case, but rather asked them to perform other tasks for him, such as getting him a softer pillow in his cell. Dr. Auble testified that Defendant did not have the present ability to consult with his attorneys with a reasonable degree of rational understanding, lacked a rational and factual understanding of the proceedings against him, and did not have the mind and discretion to enable him to appreciate the charges against him and to present a proper defense.

On cross-examination, Dr. Auble admitted that Defendant's medical records and her personal interviews of Defendant support the fact that Defendant has malingered in the past. Further, Dr. Auble admitted that Defendant has manipulated the system in the past with his psychological problems. Dr. Auble further testified that she had not performed any tests on Defendant in preparation for the competency hearing in this case. Dr. Auble also admitted that Defendant had also discussed various aspects of his defense with his attorneys including: Jose Gonzales' identification of him; discrepancies in his appearance and the person depicted in the composite drawing following the murders; and the proof presented at the Captain D's murders. Dr. Auble further acknowledged during cross-examination that Defendant understood the roles of the prosecutor, judge, and defense attorneys, but explained that she believed he understood those roles "in the abstract." Dr. Auble acknowledged that Defendant closely followed other defendants' legal proceedings, including death row inmate Phillip Workman, whose case had received a lot of media attention around the time of the competency hearing.

When questioned by the court, Dr. Auble explained that her opinion in this case on Defendant's competency differed from her opinion at the Clarksville competency hearing in two respects. First, Defendant's distrust of his attorneys had worsened. At the time of the prior hearing, Defendant had trusted at least one of his attorneys. However, at the time of this hearing, he did not have an attorney that he could relate to at all. Second, his focus on details and avoidance of issues was much more extreme now. Dr. Auble testified that Defendant could not process what was discussed concerning his case and could not tell her about it later. Upon further questioning by the

court, Dr. Auble acknowledged that Defendant understood the possible outcomes in a case such as his, but believed that in his case, there was only one predetermined outcome.

Mary Ann Hea, a social worker employed by the Public Defender's Office, testified that she had met with Defendant in her role with the Public Defender's Office. She testified that Defendant had expressed his distrust of his attorneys to her. She further testified that he did not want to talk to her about his case, but instead talked about becoming a lawyer when he got out of prison, his plans to marry in the future, television shows, his vocabulary words, and his childhood. He told Ms. Hea that parts of his brain were missing, and that although he was 42 years old, he had the brain of a 21 year old. Ms. Hea admitted on cross-examination that it was not unusual for defendants who had received the death penalty to be dissatisfied with their attorneys. She further acknowledged that Defendant had requested documents from his previous trials in order to work on his appeal.

Reverend Joe Ingle had served as Defendant's pastor since June 1997. The court ruled that Reverend Ingle could not testify as to his confidential conversations with Defendant because Defendant had not waived the priest-parishoner privilege. Reverend Ingle testified that he had been involved with prison ministries since 1974. It is in that capacity that he met Defendant and assumed the role of his pastor. He testified that he had spent more than seventy-five hours meeting and talking with Defendant. Like the witnesses before him, Reverend Ingle testified that Defendant did not focus on his trial and strategy, but instead focused on irrelevant details. Reverend Ingle also testified that Defendant spent most of his days trying to appear normal, when he in fact is not. He explained that Defendant watches people and tries to mimick them so he will appear normal. He further testified that Defendant was unable to function in basic ways that other people function, and in many respects is much like a twelve-year-old boy.

The defense next called Jamie Kyne to testify. Mr. Kyne became acquainted with Defendant through Reverend Ingle and the prison ministry. Mr. Kyne testified that he had visited with Defendant at the prison and through letters. Although Mr. Kyne holds a doctorate in clinical psychology, his testimony at the competency hearing was strictly limited to that of a lay person. Mr. Kyne explained that Defendant considered the trial to be a theatrical event, which had a predetermined outcome. Mr. Kyne testified that Defendant had an irrational understanding of the judicial system and his present defense counsel. He further testified that although Defendant believed in the past that he was under government surveillance, he no longer believed that to be true. Mr. Kyne further explained that Reverend Ingle had asked him to visit Defendant and did so "anticipat[ing] the possibility of me sitting here today."

Dr. David Martell testified on behalf of the State. Dr. Martell is a psychologist specializing in forensic psychology and neuropsychology. Dr. Martell had evaluated Defendant prior to the Captain D's trial, and he had conducted a two hour interview with Defendant on the day before his testimony in this case. Dr. Martell testified that at the most recent interview, Defendant was not experiencing any hallucinations or delusions. Dr. Martell further testified that Defendant advised him that his attorneys had decided to present a mental illness defense because he had been convicted at his first trial. Defendant told Dr. Martell that his attorneys told him they could save him from his

sentence of death, if they could show he suffered from a mental illness. Defendant further told him that Dr. Auble had previously advised that she was not an advocate of the death penalty and would do whatever she could to keep him from being electrocuted.

Defendant advised Dr. Martell that he believed the prosecutor was attempting to manufacture evidence against him by making the murders at Captain D's and McDonald's appear similar. Defendant referred Dr. Martell to discrepancies in the evidence in the Captain D's trial as proof of his belief. Defendant told him that at the preliminary hearing in the Captain D's trial, the police and medical examiner testified that the shots to the Captain D's victims had been to the body. At trial, however, the prosecutor found a second medical examiner who testified that the shots had in fact been to the head. Defendant believed that the change in testimony resulted from the prosecution attempting to show that the murders in the Captain D's and McDonald's cases were similar. Dr. Martell testified that Defendant had advised that he could not trust his attorneys because they were not doing the best job they could. Dr. Martell explained that he did not believe that Defendant thought that his attorneys were actually trying to kill him, but rather they were "killing him through incompetence." Dr. Martell testified that Defendant has a personality disorder that makes him a very difficult individual with whom to work. Dr. Martell explained that Defendant was frustrated with his attorneys' performance, but the frustration did not rise to the level of paranoia.

Dr. Martell opined that Defendant did not suffer from a mental illness that would render him unable to understand the legal process. In fact, Dr. Martell concluded that Defendant had an "acute understanding" of the trial procedures and the post-conviction process. He testified that Defendant understood the roles of the judge, jury, defense attorneys, and prosecutors. Dr. Martell also testified that Defendant understood that he had been charged with a capital offense.

On cross-examination, Dr. Martell acknowledged that Defendant does not believe that he is mentally ill and does not want to be perceived as being mentally ill. Dr. Martell further admitted that during the Captain D's proceedings, he had diagnosed Defendant as having a delusional disorder with grandiose and persecutory features. However, Dr. Martell testified that this condition seemed to be in remission during his recent interview with Defendant.

Dr. Keith Caruso testified as an independent expert appointed by the trial court. Dr. Caruso met with Defendant on three occasions for a total of seven and one-half hours. In addition, he reviewed the reports of the other experts and the transcripts from the Clarksville competency hearing. Dr. Caruso concluded that Defendant was incompetent to stand trial. During the direct examination by defense counsel, Dr. Caruso explained his opinion as follows:

[H]e appears to have a schizo-affective disorder, bipolar type, most recent episode mixed, which includes both manic and depressive features. There are several symptoms that he has of that condition I feel that interferes with his competency at this time. I believe that he has persecutory paranoid grandiose delusions that involve the government and date back a number of years, but more recently have begun to incorporate yourself, Mr. Baker, and Ms. Deaner [defense counsel], among others

into his delusional system in that he has, that has impaired him because of his paranoia about you [defense counsel] and your [defense counsel's] motives. That has impaired him in his capacity to work with you [defense counsel].

I believe also associated with the delusional system, he also has a thought disorder that is manifested by tangential speech, loosening of associations, preservative thought, concrete thought processes as well. I feel that it makes it difficult for him to reason and to think clearly at all times. I think there are times where he has windows where he appears to think clearly, but what I felt on that issue was that it was essentially that it was not predictable when those would occur, in that he does not have predictable competency. I feel he is incompetent in those areas as well.

I did feel that he had irrational as well as factual appreciation of the possible consequences of the charges against him.

Dr. Caruso further testified that he did not believe Defendant was malingering, but instead believed that Defendant attempted to appear more normal than he was. He testified that he did not believe that replacing Defendant's attorneys would restore his competency.

On cross-examination, Dr. Caruso admitted that no other expert had diagnosed Defendant with schizo-affective disorder. Dr. Caruso further testified that in some of his meetings with Defendant, Defendant had discussed the evidence against him and the defense strategy. Defendant further explained to him why he did not want to present mitigation proof at trial. As a result, Dr. Caruso admitted that Defendant had an understanding of court procedure, the parties' roles, and the purpose of the competency proceedings. Dr. Caruso testified that Defendant's inability to consult with his defense attorneys was the most crucial element of his incompetency.

Dr. Caruso was also questioned by the court regarding his opinion. Dr. Caruso testified that Defendant had an understanding of the charges against him and the nature of the legal proceedings. He further testified that Defendant understood the possible penalties and could discuss his defenses. When the court questioned Dr. Caruso as to how he and Dr. Martell could have come up with different opinions when they met with him during the same time frame, Dr. Caruso explained that Defendant's moods change often and his thought disorder may be associated with his condition at the time. Therefore, his lucidity may change from hour to hour.

Following the testimony by Drs. Auble, Martell, and Caruso, the court continued the competency hearing for an evaluation of Defendant by the Department of Mental Health, Forensic Services Division. The court resumed the competency hearing on May 1, 2000. Three witnesses from the Department of Mental Health testified. Dr. Samuel Craddock was the first from the Department to testify.

Dr. Craddock, a forensic psychologist, testified that he had performed approximately 1200 court-ordered forensic examinations for competency and sanity. Dr. Craddock met with Defendant on four occasions at the Riverbend Maximum Security Institute, where Defendant was housed. Dr. Craddock also conducted an interview of Defendant on the morning of the hearing. According to Dr. Craddock, Defendant conversed with him in a rational manner. At the May 1, 2000 meeting, Defendant advised that he was “definitely 100 percent ready to proceed with his trial, that he feels confident in himself.” Dr. Craddock testified that in his professional opinion, Defendant was competent to stand trial. He based his opinion on the following: “that he understands the seriousness of the charges against him, that we think that he can participate in his defense, that he has a factual understanding of how he might go about defending himself, and he says that he is willing to cooperate with his attorneys in trying to achieve the best possible outcome.” Dr. Craddock further explained that there are features of his personality that severely interfere with his ability to work with his attorneys. Dr. Craddock testified that “Mr. Reid has a strong desire to show his competence in whatever area it may be, that he does not like to surrender his individuality. He is an independent person who likes to be in control, and when his control is taken away from him he engages in a variety of activities that are not conducive to working with his attorney.”

Dr. Craddock and the other members of the evaluation team gave Defendant the following diagnoses: on Axis 1 - mixed receptive and expressive language disorder; on Axis 2 - anti-social personality disorder; and on Axis 3 - hearing loss in the left ear and congenital malformation of the left temporal lobe of the brain. Dr. Craddock testified that he did not give a diagnosis of delusional disorder or bipolar disorder on Axis 1, because he did not see the signs or symptoms of those disorders at the time of the evaluation. Dr. Craddock testified that he did believe that Defendant had been mentally ill in the past and had been incompetent in the past. Dr. Craddock testified that he disagreed with the diagnoses of Drs. Auble and Caruso because Defendant did not present symptoms of mental illness during his evaluation. Dr. Craddock further opined that he believed at times Defendant had exaggerated his mental well-being, while at other times he had exaggerated his mental illness. Dr. Craddock testified that Defendant had expressed a distrust of his attorneys, but at the same time Defendant told him that he was willing to cooperate and work with his counsel. While Dr. Craddock admitted that Defendant had a history of expressing delusional beliefs, he did not believe that Defendant was currently delusional. He did not believe that delusional beliefs influenced Defendant’s day-to-day behavior, particularly with respect to competency.

The other two members of the evaluation team at the Department of Mental Health also testified. Dr. Rokaya Farooque, a psychiatrist with the department, and Rebecca Smith, a social worker with the Department, both basically testified that they concurred in the opinion given by Dr. Craddock. Both of these witnesses testified that Defendant was competent to stand trial.

Dr. Pamela Auble testified on rebuttal. Dr. Auble testified that she re-evaluated Defendant on April 17, 2000, and found Defendant’s mental condition to be worse than it had been in February 2000. As support for her opinion, Dr. Auble testified that Defendant advised her in April that he believed that a TBI agent may have been planted in the cell next to him who was threatening to kill him and disrupt his life so that he would be unable to prepare for his trial. Dr. Auble further opined



that Defendant's trust in his legal counsel had deteriorated. Dr. Auble also explained that Defendant desperately wants to be found competent, and that he has learned from the competency hearing that trusting his attorneys is a major component of the finding. Therefore, he has begun to make statements to others that he trusts his attorneys in an effort to bolster his competency.

### **Guilt phase**

On March 23, 1997, Ronald Santiago, Andrea Brown, Robert Sewell, and Jose Ramirez Gonzales worked the night shift at the McDonald's restaurant on Lebanon Road in Nashville. Jose Gonzales testified at trial that he had been in the United States for approximately two or three months. He had worked at the McDonald's on Lebanon Road for only three days. Around midnight, Robert Sewell and Jose Gonzales exited the restaurant after work to enter their cars to go home. Robert Sewell exited first, with Jose Gonzales following after him. Jose Gonzales said goodnight to manager Ronald Santiago, who was standing in the doorway of the restaurant. As Sewell and Gonzales walked into the parking lot, a man approached them with a bag under his arm and a gun in his hand. The color of the gun was in dispute at trial. Gonzales first testified that the gun was a gold color, but later testified that the gun was a silver color. He explained through his interpreter at trial that he calls "silver a gold color." Gonzales also testified that he saw the perpetrator's face as he approached them in the parking lot. On cross-examination, Gonzales admitted that at the preliminary hearing that he had testified that the parking lot was lit, but not well lit.

Gonzales testified that he heard the man speak, and Ronald Santiago explained to him in Spanish that the man ordered them to return to the restaurant. All of the men followed the orders and went back into the restaurant, where Andrea Brown had remained. Once inside, the man forced them into the office area where he demanded the money from the restaurant's safe. Manager Santiago complied with the man's request and gave the man the money from the safe. Gonzales also testified that while they were all in the office area, he was able to see the man's face for approximately five seconds. On cross-examination, Gonzales admitted that at the preliminary hearing, he had testified that he had seen the man's face for only one to two seconds. Next, the man ordered the employees into the storeroom, where he forced them to lie down. Again, the employees complied with the request. The man then walked over to Ronald Santiago and shot him twice in the head. Andrea Brown and Robert Sewell were shot in similar style. However, when the man approached Jose Gonzales, the gun would not fire. Gonzales attempted to fight with the perpetrator, but he was overpowered. The man then took out a knife and repeatedly stabbed Gonzales. Gonzales testified that he was stabbed in the stomach and struck in the face. After he fell to the ground, Gonzales was stabbed and kicked many times. Gonzales further testified that though the storeroom was dark, once his eyes adjusted, he was able to see. Gonzales testified that after he was knocked to the ground, he attempted to hold his breath so the perpetrator would think he was dead. As he was lying on the ground, he could hear air escaping from his lungs. After the perpetrator left the restaurant, Gonzales was able to crawl to a phone and call for help.

Gonzales called 911, but because he was speaking Spanish, the operator could not communicate with him. Dorothy Carter, the 911 dispatcher who answered Gonzales' call, testified

that she could only hear groans and mumbling from the caller. She testified that she could not communicate with the caller, but immediately dispatched police and an ambulance to the scene. Gonzales testified that because he was unable to communicate with 911, he then called his cousin and asked him for help. The police arrived two to four minutes later. He was taken to the hospital by ambulance, but he explained that he did not remember anything thereafter. Ronald Santiago and Robert Sewell were found dead at the scene. Andrea Brown was taken to the hospital, where she later died.

Andrea Brown's father, Doyle Brown, testified that his daughter had not been scheduled to work on Sunday, March 23, 1997, but was called in to work that afternoon. Typically, Andrea would call her father to pick her up shortly after the restaurant closed at 11:00 p.m. Mr. Brown had not heard from his daughter by midnight; therefore, he paged her. When she did not return his call, he drove to McDonald's. Upon his arrival, he saw numerous police cars and ambulances. He was able to see his daughter at the hospital that night, but she was unconscious and on life support. She died the following day.

Connie Chesmore, Robert Sewell's sister, and Ivette Rivera, Ronald Santiago's wife, also testified. Ms. Chesmore testified that her brother, who was twenty-three years-old, had been working for McDonald's since high school, but had only been working at the Lebanon Road restaurant for approximately one month. Ms. Rivera testified that her husband was the manager of the Lebanon Road McDonald's. Mr. Santiago was not scheduled to work on March 23, but went into work that afternoon anyway. Ms. Rivera's brother was supposed to pick Mr. Santiago up from work at 11:30 p.m. Ms. Rivera was notified by her brother and sister-in-law at approximately 4:30 a.m. on March 24 that her husband had been murdered.

Metropolitan Police Officer Christopher Brennan arrived at McDonald's at approximately four minutes after midnight on March 24. When he arrived, he found a car parked in the drive thru of the restaurant. He learned that the person inside the car was Ronald Santiago's brother-in-law, who was there to pick him up from work. Officer Brennan asked him to wait inside his police car. Once inside the restaurant, he saw large amounts of blood. He also described the scene as chaotic. Officer Brennan, along with at least two other emergency personnel, admitted that they probably walked through some of the blood that night. At least one of the emergency personnel explained that the first priority was in trying to save lives.

Detective Mike Rolland was called to investigate the scene, and he obtained both fingerprints and footprints from the scene. He also requested that hair and fiber evidence be secured. None of the fingerprints, shoe prints, or hair found at the scene could be matched to Defendant. Detective Rolland also assisted in the search of Defendant's home. Although a pair of Defendant's black tennis shoes were seized, they did not match any of the shoe prints found at the scene. Additionally, no blood was found on the shoes. Detective Rolland also confirmed that Defendant's car was searched, but no evidence from the car linked Defendant to the scene. The officers at the scene also collected six Remington .25 automatic cartridge cases. Six fired .25 bullets were subsequently

recovered from the bodies of the three victims. Testing later revealed that the bullets had been fired from the same weapon.

Ray Daniel, the vice president and director of operations for McDonald's Management Corporation, testified that he was called to the scene to determine how much money had been taken. He testified that \$2358.57 had been taken, and \$305.55 of the total amount was in coins.

Jose Gonzales was the sole survivor of the McDonald's crew who had worked on Sunday, March 23, 1997. While hospitalized, Mr. Gonzales assisted the police in identifying the perpetrator. Gonzales worked with Detective Pat Postiglione and Officer Juan Borges, who acted as an interpreter, in identifying the McDonald's murderer. Gonzales described the man as 29 to 30 years old, possibly 6'2" or taller, thin, possibly of a Hispanic mix, with hair sticking out of a baseball cap. He further described the man as having a long, thick moustache, wearing a dark blue jacket and dark blue pants. From his description, a police artist drew a composite sketch. Gonzales viewed 300 to 400 photographs of potential suspects, not including Defendant. Most of the pictures Gonzales viewed were single shots, presented in a book. Detective Postiglione testified at trial that he also showed Gonzales five photograph lineups, as opposed to single shots. He further testified that he showed Gonzales at least one photograph lineup by itself, that was not a part of a book. Officer Borges testified that Gonzales was not shown a photograph lineup that was not a part of a book until he made the identification of Defendant on June 2, 1997. Further, Mr. Gonzales also testified that he had only looked at pictures that were a part of a book until the night he identified Defendant.

Defendant was arrested in Cheatham County on charges unrelated to this case. The officials in Cheatham County notified Detective Postiglione of the arrest, because Defendant looked similar to the suspect in the composite drawing. Defendant's fingerprints were obtained on June 2, 1997. That same day, the Metro Nashville police matched Defendant's fingerprint to a print found on a movie card that belonged to one of the Captain D's victims. Thereafter, Detective Postiglione drove to Cheatham County and obtained a photograph of Defendant.

Detective Postiglione testified that he put together a photograph lineup for Gonzales to view. He explained that he chose pictures of five people who resembled Defendant in creating the lineup. Detective Postiglione admitted that Defendant was the only person wearing a dark sweatshirt and the only person showing his teeth in his photograph. Detective Postiglione explained that he could not conduct a physical lineup because Defendant was in custody in Cheatham County. He also testified that the media had information that a suspect was in custody in Cheatham County for the Captain D's and McDonald's murders, and the media was attempting to obtain a picture of the suspect. Detective Postiglione asked Officer Borges to contact Mr. Gonzales and ask that he come to the police station to view some photographs. At approximately 8:30 p.m. on June 2, 1997, Jose Gonzales went to the Criminal Justice Center and viewed a photograph lineup. From the lineup, Mr. Gonzales identified Defendant and told the detectives that he was 95% sure that the man in the photo was the man who committed the McDonald's crimes. Thereafter, Defendant was arrested and transported to the Metro Police Department. Before transporting Defendant from Cheatham County to Davidson County, the authorities and Defendant discussed the possibility of Defendant covering

his head with his jacket. At first, Defendant advised that he wanted to cover his face, but later decided against it. When he was taken to be charged, Defendant turned and looked directly into the cameras.

Defendant Paul Dennis Reid moved to Nashville from Texas to become a country music star. He was employed as a cook at a Shoney's restaurant. Mitchell Roberts was his manager. At one point, Defendant returned to Texas, but he was back in Nashville by the spring or summer of 1996. Upon his return, he worked part-time at Shoney's and enrolled in classes at Volunteer State Community College. Defendant's employment with Shoney's ended in February 1997. Mitchell Roberts testified that after Defendant's employment with Shoney's ended, he did not see the defendant again until he showed up at his home unexpectedly in June 1997. Mr. Roberts testified that when Defendant showed up at his home, Defendant had a small caliber automatic handgun and a knife that was approximately eight or nine inches long.

Two of defendant's former Shoney's co-workers testified that Defendant had engaged in conversation concerning robbery of fast-food restaurants as a means of making money. Danny Tackett testified that Defendant was in dire straits financially. During a January 1997 conversation, Defendant told Mr. Tackett that given his size and Tackett's speed, they could "go anywhere and get anything." Defendant then asked him how he thought they could make money, and Tackett replied that they could rob a fast-food restaurant in the middle of the night when there would be no witnesses. Mr. Tackett admitted on cross-examination that Defendant often made jokes, and he thought Defendant was joking when the comments were made. Tackett also testified that Defendant had asked him to get a gun for him. Tackett declined to do so, but he saw another Shoney's employee attempt to sell defendant a shotgun. Ultimately, Defendant did not purchase the shotgun because it was "too large."

Jeffrey Potter testified that in January 1997, Defendant told him that robbery was an easy way to make money without having to work for it. Mr. Potter also testified that Defendant asked him if he knew where he could get a gun. Mr. Potter admitted that he did not tell the police about either of these incidents when they first interviewed him on June 7, 1997.

Shirley June Pierce testified that she is employed at Wayne's Unisex Hair Salon on Gallatin Road. She testified that she cut Defendant's hair on April 2, 1997. She testified that she recognized Defendant's picture following his arrest and contacted the police. She explained that when Defendant came in for his hair cut, his hair was shorter on the sides, but over the collar in the back. She further testified that he wore his hair slicked back off his ears. He specifically asked that she cut both the sides and back of his hair. The State called Holly Anderson during rebuttal of the guilt phase. Ms. Anderson stated that she cut Defendant's hair in May 1997, approximately five days before his arrest. She testified that his hair was "about to his shoulders" and hit the bottom of his neck. She testified that she cut approximately one inch off his hair.

Robert Bolin, whose father lived in the same boarding house as Defendant, testified that in January 1997, Defendant asked him to obtain a .25 automatic handgun. Defendant advised that he

wanted the handgun for his personal protection. Mr. Bolin sold Defendant two .25 automatic handguns during January 1997. The first handgun was a Davis .25, which Bolin described as nickel-plated with black handle grips. The second handgun was also a .25 automatic, which was nickel-plated with pink handles. Further, Mr. Bolin testified that he gave Defendant a box of ammunition that came in a green and yellow box, but he could not recall the brand of the ammunition.

At trial, experts testified that Defendant's fingerprints were not found at the scene. Additionally, the parties stipulated that the debris collected from the clothing of the victims could not be matched to Defendant. Defendant's footprints were not found at the scene.

Tennessee Bureau of Investigation Agent Tommy Heflin examined the six fired Remington brand .25 automatic cartridge cases recovered from the crime scene. Agent Heflin concluded that they had been fired from the same weapon. Agent Heflin also examined the six bullets that had been recovered from the bodies of the victims and concluded that the bullets were fired from the same weapon and were Remington brand. Agent Heflin testified that Remington ammunition comes in a green and yellow box.

Dr. Bruce Levy reviewed the autopsies of the three victims. Each of the three victims died as a result of two gunshot wounds to the head. Dr. Levy used styrofoam heads as demonstrative evidence in describing the victims' wounds.

### **Sentencing phase**

Brian Johnson, an assistant attorney general in Harris County, Texas, testified that Defendant was convicted of aggravated robbery in 1984. The parties stipulated that this crime involved the use of violence to the person.

Walt Draper, the chief administrative officer for the Davidson County Criminal Court Clerk's Office, testified that Defendant had been convicted of two counts of first degree murder and one count of aggravated robbery in Davidson County on April 14, 1999. The parties stipulated that these crimes involved the use of violence to the person.

John Carney, Jr., the District Attorney General for the Nineteenth Judicial District, testified that Defendant had been convicted of two counts of first degree murder, two counts of especially aggravated kidnapping, and one count of especially aggravated robbery in Montgomery County on September 22, 1999. The parties stipulated that these crimes involved the use of violence to the person.

Detective Pat Postiglione testified that the Captain D's murders and robbery for which Defendant had been convicted were similar to the McDonald's case. Detective Postiglione testified that the crimes were committed at fast food restaurants on a Sunday, while the restaurants were closed, and both of the restaurants were locked following the crimes. Further, there was no sign of forced entry at either of the restaurants, which were approximately three miles apart. All of the

murders were committed with a small caliber weapon, and all of the victims were required to lay on their stomachs in the cooler area of the restaurant. All of the victims were shot at least two times in the head.

The State also introduced the victim impact testimony of the family members of the victims. Connie Chesmore, Robert Sewell's sister, testified first. She explained that her brother had turned twenty-three two weeks before his murder. She testified that her brother's murder had affected their family "in every way." She explained that her father was too angry to even attend the trial and that her mother was unable to testify. Brenda Sewell, Robert Sewell's youngest sister, also testified. She testified that her brother was living at home at the time of his murder. She testified that he was very kind and also shy. She testified that following her brother's death, she had purchased a stun gun, and she is not able to be at work alone anymore. She testified that her father had taken her brother's death the hardest, but her mother had been very affected also. She testified that her mother had cooked dinner for Robert before work everyday, and now she has stopped cooking.

Ivette Rivera, Ronald Santiago's wife, testified that she and her husband had been married for three-and-one-half years. She testified that it was very hard for her to prepare to live without her husband. She also explained that she and Ronald had one daughter together, and she was having a very difficult time. She testified that her daughter asks for her father everyday. She also explained that her husband had called their daughter "princess," and now their daughter will not allow anyone to call her by that name.

Ronald Santiago's brother, Jamie Palmir, testified that his brother's murder had devastated his family. He described his brother as a happy, courageous person who wanted to help people. He testified that his brother came to the United States from Puerto Rico, although he could not speak English, because he wanted to make a better life for his wife and daughter. He explained that his mother had been affected emotionally and psychologically by Santiago's death. He explained that prior to his brother's death, his mother was a very happy person, but she is not the same person anymore. He testified that her doctor would not allow her to travel to Nashville. He also testified that their other brother was experiencing heart disease and simply could not deal with his brother's death.

Doyle Brown testified that his daughter, Andrea Brown, was seventeen at the time of her murder. He testified that she attended Hume-Fogg High School, was a good student, and had a lot of friends. He further explained that she volunteered at the downtown Mission and aspired to be a chef. Mr. Brown testified that following Andrea's death, his other daughter, April, was struggling in school and had to see counselors regularly. He testified that he had kept Andrea's room and car, which was purchased the day before the murders, the same as they were prior to her death. Mr. Brown testified that he would never recover from his daughter's death.

Dr. Xavier Amador testified on behalf of the defense. Dr. Amador testified that Defendant suffered from chronic paranoid schizophrenia. He also opined that Defendant suffered from

pervasive delusions in which he leads himself to believe that he is someone very important and paranoid delusions in which he believes that the government is continually watching him.

Dr. Amador had interviewed Defendant's family members, including his mother and sister. Defendant has suffered long-standing delusions. He explained that Defendant believes he has been under continuous government surveillance since 1978 and that he is a test subject. He testified that Defendant is reluctant to discuss his beliefs because he feels loyal to the government agency, the surveillance team, that selected him for the secret mission. At the same time, Dr. Amador explained that Defendant felt betrayed by the surveillance team. However, he would not reveal the identity of the surveillance team out of his loyalty to them. Moreover, Dr. Amador testified that Defendant has delusions that the team was going to have his convictions in Texas expunged and was going to take care of the legal situation he was currently experiencing. Dr. Amador explained that Defendant believed he was going to become a lawyer when "this is all over." Dr. Amador opined that Defendant suffered from anosognosia, an unawareness of his mental illness, as a result of both the schizophrenia and brain damage. On cross-examination, Dr. Amador testified that Defendant's awareness of his mental illness comes and goes.

Dr. Amador characterized Defendant's brain as "broken." He testified that Defendant had brain damage as a result of head trauma, which caused him to be impulsive and to have instances of rage. Dr. Amador told the jury of childhood head injuries Defendant received. He also described Defendant's unstable family history and his behavioral problems as a child.

On cross-examination, Dr. Amador acknowledged that Defendant had accused him of lying about Defendant's mental illness. Specifically, Defendant stated that Dr. Amador was against the death penalty, had been recruited by Reverend Ingle to testify, and would lie to save him from the death penalty. Dr. Amador acknowledged that Reverend Ingle had in fact persisted that he interview Defendant. Dr. Amador further testified that Defendant would not allow his family to testify at trial. He explained that his sister's testimony in a previous trial pained him because she discussed abuse that had occurred in the family. Dr. Amador testified that Defendant believed his sister was being controlled by the surveillance team. Dr. Amador acknowledged, however, that Defendant's sister's previous testimony had not been favorable for Defendant. Defendant's sister had testified that Defendant had tried to rape her in the past and had attacked her with a knife.

Patricia Allen next testified on behalf of the defense. Ms. Allen is employed as a speech language pathologist at Vanderbilt Medical Center, where as part of her duties she treats persons with traumatic brain injuries. She evaluated Defendant after a referral from Dr. Auble. Prior to evaluating Defendant, Ms. Allen obtained his medical and school records.

Ms. Allen testified that Defendant was raised in a very chaotic home and that much of the chaos occurred at a time when Defendant was learning language skills. She explained that when Defendant's mother abandoned him at age two, he went to live with his grandmother. Thereafter, he was sent to live with his father, and he was subsequently sent back to live with his grandmother.

Ms. Allen testified that Defendant did not have the type of environment that would promote learning speech and language skills in a normal way.

Ms. Allen testified that Defendant had suffered multiple head injuries. At the age of five, Defendant was hit in the back of the head with a brick. At the age of 13, Defendant fell off a bicycle and suffered head injuries and additional hearing loss. Six months later, Defendant was hit by a car while riding his bicycle and thrown through the car's windshield. Additionally, in 1990, Defendant was involved in an automobile accident in which he lost consciousness. Defendant's family members noted that his behavior changed for the worse following the head injuries. Ms. Allen concluded that the behavior described by the family members was consistent with that of someone suffering from brain injury.

After performing tests on Defendant, Ms. Allen concluded that his language and thinking was indicative of and fit the profile of a person with acquired brain injuries. Ms. Allen further testified that Defendant had a difficult time in determining how to act in a normal way and to be accepted by those around him.

On cross-examination, Ms. Allen admitted that she did test Defendant for malingering. She acknowledged that Defendant was able to read on an adult level and scored average and above-average on several of the twelve tests he was administered. Ms. Allen further admitted that prior to the crimes, Defendant was living a "fairly normal life, even with his brain abnormality."

Dr. Pamela Auble, a neuropsychologist, testified that Defendant suffered from abnormalities in his brain that resulted in difficulties with language skills, reasoning in complicated situations, and the motor skills in his left hand. Dr. Auble also discussed Defendant's head injuries and the deformity of his left ear. She explained that Defendant's brain injuries caused his language to be abnormal. Specifically, Defendant's language does not sound normal. Defendant talks too much and uses odd words, and he has difficulty in making sense out of situations and coming to good decisions. Dr. Auble concluded that Defendant suffered from delusional beliefs. She too testified as to his delusional belief that he was under constant government surveillance. She also explained to the jury that he believed that the inmate in the cell next to him was a government agent placed there in an attempt to either kill him or drive him crazy. Dr. Auble dismissed the idea that Defendant was malingering. She testified that she had tested him and determined that he was not malingering.

Dr. Auble also testified as to Defendant's chaotic lifestyle as a child and the head traumas Defendant had suffered. Dr. Auble concluded that Defendant suffered from psychotic disorder with delusions due to a general medical condition. She further explained that Defendant suffered from a cognitive disorder and personality changes due to the head traumas he had sustained. Dr. Auble also concluded that Defendant's mental illness and brain injury had a "significant impact" on committing these crimes.

On cross-examination, Dr. Auble admitted that Defendant had malingered in the past. She further admitted that he had lied to others about statements she had made to him. Dr. Auble agreed



that the acts of planning an armed robbery, committing murder, and destroying any evidence of the crimes were not impulsive.

Dr. Robert Kessler, a neuroradiologist, testified as the last defense witness at the sentencing hearing. Dr. Kessler performed magnetic resonance imaging (MRI) and positron emission tomography (PET) scans on Defendant. Dr. Kessler opined that Defendant suffered shrinkage or atrophy to the left temporal lobe of the brain. He further testified that Defendant had decreased glucose metabolism, which resulted from the dysfunction of the left temporal lobe. Dr. Kessler testified that Defendant's brain damage was likely caused by a brain trauma, sometime after age seven to eight. Dr. Kessler explained that brain damage to the temporal lobe is associated with psychotic disorders that have delusional states. On cross-examination, Dr. Kessler admitted that although he had seen a few hundred people with left temporal lobe abnormalities, Defendant was the only one who had been charged with murder. He also acknowledged that Defendant's temporal lobe abnormality would not have prevented him from planning or executing a robbery or murder.

The State called Dr. Helen Mayberg, a neurologist at the University of Toronto, for rebuttal proof. Dr. Mayberg agreed with Dr. Kessler that Defendant suffered from an abnormality of the left temporal lobe of the brain. Dr. Mayberg opined, however, that Defendant's brain damage was the result of a congenital condition, rather than a brain trauma. She further testified that there is not one area of the brain that can be associated with schizophrenia or psychosis. Dr. Mayberg testified that Defendant's brain abnormality did not contribute to or cause the murders at issue.

### **ANALYSIS**

On appeal, Defendant has presented multiple issues, which we will address as follows.

#### **1. Failure to dismiss indictment because aggravating factors not listed in indictment**

First, Defendant contends that because the indictment returned against him did not set forth the statutory aggravating circumstances relied upon by the State in charging him with a capital offense, the indictment is faulty and must be dismissed. Defendant acknowledges that he made this same argument in the appeal of his Montgomery County convictions and sentences, but it was rejected by this court. Defendant urges this court to reconsider its decision in State v. Reid, No. M2001-02753-CCA-R3-DD, 2003 WL 23021393 (Tenn. Crim. App., Nashville, Dec. 29, 2003). However, the Tennessee Supreme Court has released its opinion in the appeal of Defendant's Montgomery County convictions, and the Court reaffirmed its earlier decisions in holding that "Tennessee's capital sentencing scheme does not require that aggravating circumstances be included in an indictment." State v. Reid, \_\_\_\_ S.W.3d \_\_\_\_, No. M2001-2753-SC-DDT-DD, 2005 WL 1219263, \* \_\_\_\_ (Tenn. May 24, 2005). Accordingly, the trial court did not err in refusing to dismiss the indictment. Defendant is not entitled to relief on this issue.

## **2. Constitutionality of Tenn Code Ann. Sec. 39-13-204(c)**

Defendant contends that Tennessee Code Annotated Section 39-13-204(c) is unconstitutional. However, he has not presented any constitutional challenges to the death penalty statutes that have not been previously reviewed and rejected. The death penalty statutes have repeatedly been held constitutional. See e.g., State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), *cert. denied*, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001); State v. Nesbit, 978 S.W.2d 872, 902 (Tenn. 1998), *cert. denied*, 526 U.S. 1052, 119 S. Ct. 1359, 143 L. Ed. 2d 520 (1999); State v. Vann, 976 S.W.2d 93, 117 (Tenn. 1998), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551 (1999); State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536, 140 L. Ed. 2d 686 (1998); State v. Smith, 857 S.W.2d 1, 21-22 (Tenn.), *cert. denied*, 510 U.S. 996, 114 S. Ct. 561, 126 L. Ed. 2d 461 (1993); State v. Bane, 853 S.W.2d 483, 488 (Tenn. 1993), *cert. denied*, 510 U.S. 1040, 114 S. Ct. 682, 126 L. Ed. 2d 650 (1994).

Defendant relies upon the case of United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002) in arguing that Tennessee's capital sentencing scheme, particularly Tennessee Code Annotated Section 39-13-204(c), is unconstitutional because it allows the death penalty to be imposed based on evidence that is not subject to the guarantees of reliability and trustworthiness required by the due process and confrontation clauses of the federal constitution. However, the Supreme Court rejected this argument recently in State v. Berry, 141 S.W.3d 549 (Tenn. 2004). Defendant is not entitled to relief on this issue.

## **3. Validity of search warrants**

Defendant contends the trial court erred in denying his motion to suppress evidence seized pursuant to search warrants 146 and 149. Defendant concedes that this issue has been decided against him adversely in State v. Reid, 91 S.W.3d 247 (Tenn. 2002), but makes the argument for the purpose of preserving the issue for further review. This court must follow the holding of the Tennessee Supreme Court on this issue as set forth in State v. Reid, 91 S.W.3d at 273-76. Defendant is not entitled to relief on this issue.

## **4. Evidence of Defendant's financial condition**

Defendant contends that the trial court erred in its March 23, 2000, order which allowed the State to present limited proof of and argument of Defendant's financial condition. The trial court ruled as follows:

(1) The State may present proof that the defendant was employed by Shoney's, that he left that employment in February of 1997, that he was not granted severance pay, that he received his final check in the amount of (\$\_\_) on (date), [sic] and that he remained unemployed until the time of his arrest;

(2) The State may present proof regarding the defendant's financial status prior to March 23, 1997, the date of the McDonald's incident. The defendant will not be permitted to counter this proof with proof of expenditures or deposits unless he satisfies the court, outside the presence of the jury, that he obtained those funds from a legitimate source;

(3) The State may present proof of the defendant's financial status after the McDonald's incident and prior to the Baskin-Robbins incident. The State may not present proof of any post-April 23, 1997, expenditures; and

(4) The State may present proof that, following the defendant's arrest, the authorities searched his apartment and discovered multiple large jars full of coins.

The trial court found that Defendant's financial difficulties were relevant to his guilt of the McDonald's robbery/murders. Defendant argues that the State introduced evidence of his financial condition for the purpose of showing that he was poor and therefore had a motive to commit robbery. The State asserts, however, that proof of Defendant's financial condition was offered to show that Defendant had no legitimate source of income following the termination of his employment with Shoney's in February 1997, but did not experience a lack of money.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. Prejudicial evidence is not excluded as a matter of law. State v. Carruthers, 35 S.W.3d 516, 577 (Tenn. 2000), *cert. denied*, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757 (2001)(citing State v. Gentry, 881 S.W.2d 1, 6 (Tenn. Crim. App. 1993)).

Defendant argues that evidence that he lost his job, received no severance pay, and was unemployed at the time of the crimes is not relevant under Tennessee Rule of Evidence 401. He further submits that even if the court were to determine that this evidence had some marginal relevance, it should have been excluded pursuant to Rule of Evidence 403. In support of his argument, Defendant cites to cases from other jurisdictions that have held that a defendant's financial condition prior to the commission of a crime was of a low probative value and highly prejudicial and, therefore, excluded such evidence. However, the evidence presented at trial in this case showed not only that Defendant had lost his job and had no other source of income prior to this robbery, but it also showed that despite his lack of income, his financial condition improved after the McDonald's robbery and murders. Despite Defendant's lack of income, he purchased a gun for \$85, paid his rent for the month of April in cash, and discussed his desire to invest approximately \$3,000 following the crimes at McDonald's. Moreover, the police seized approximately \$1,000 in coins and cash expenditure receipts totaling \$807.36 from his home after his arrest. Based on the foregoing, we determine that the evidence was relevant and properly admitted. Defendant is not entitled to relief on this issue.

## **5. Testimony of Mitchell Roberts**

Pretrial, Defendant moved to exclude the testimony of Mitchell Roberts, his former manager at Shoney's. The State argued that it intended to offer testimony by Roberts that Defendant was terminated from Shoney's in February 1997 and that in early June 1997, Defendant appeared at Roberts' house armed with a .25 caliber handgun and a knife and attempted to kidnap him. Ultimately, the court ruled that Roberts could testify as to Defendant's termination and possession of a handgun and knife, but he could not testify as to his confrontation with Defendant in early June 1997 or the attempted kidnapping.

Defendant argues that Roberts' testimony should have been excluded pursuant to Tennessee Rules of Evidence 401, 403, and 404. Defendant contends that Roberts' testimony that he appeared at his home with a gun and a knife in his possession, would cause the jury to infer that Defendant was a violent person. Defendant further contends that "such a conclusion invites the jury to conclude that Defendant was guilty of these crimes simply because they conformed with his violent character," which is impermissible under Rule of Evidence 404.

This court has held that the possession of a weapon does not necessarily constitute other crimes, wrongs, or acts under Rule of Evidence 404(b). See State v. Green, No. 01C01-9510-CC-00351, 1996 WL 741551, \* 6 (Tenn. Crim. App., Nashville, Dec. 30, 1996); State v. Sanders, No. 01C01-9003-CR-00091, 1990 WL 172627, \* 3 (Tenn. Crim. App., Nashville, Nov. 9, 1990). As this court has explained, possession of a weapon can be relevant to demonstrate a defendant's knowledge of and access to a weapon similar to the weapon used in the crime at issue. Green, 1996 WL 741551 at \*6. After a review of the evidence in this case, we conclude that the trial court did not err in allowing Mitchell Roberts to testify that he saw Defendant in the possession of a gun and knife. The weapons that he viewed were similar to the weapons used in the commission of the crimes at issue in this case. Mr. Roberts' testimony was relevant to show that Defendant had access to and possession of the same type of weapons used in the McDonald's crimes. Further, we conclude that Defendant's possession of these weapons did not constitute evidence of other crimes, wrongs, or acts under Rule of Evidence 404(b) and that the introduction of this evidence was not for the purpose of impugning Defendant's character by a prior bad act. Defendant is not entitled to relief on this issue.

## **6. Admissibility of identification testimony**

Next, Defendant contends that the trial court erred in failing to suppress Jose Gonzales' identification of him. In his motion to suppress, Defendant argued that the photographic lineup conducted by the Metropolitan Nashville Police Department was unduly suggestive and resulted in an unreliable identification. In support of his motion, Defendant specifically argued that the background of his photograph is lighter in color than the other photographs; that Defendant is the only person pictured smiling; that Defendant's picture was placed in the center top row where a viewer's eye is naturally drawn; that the viewing of the photographic lineup in question occurred at night, unlike the other viewings by Gonzales; that the photographic lineup in question was different because Gonzales had viewed all of the previous photographs in a book; and that there was a

heightened sense of excitement on the night of the lineup in question. The trial court rejected each of Defendant's arguments and found that the lineup and the procedures used in displaying the lineup were not unduly suggestive.

The trial court was very specific in its order denying Defendant's motion to suppress Gonzales' identification. The court found that although the background of Defendant's picture is lighter than the backgrounds of the other five photographs, none of the backgrounds depicted in the pictures are identical. Additionally, the court found that the physical characteristics of the men depicted in the photographs are quite similar in many respects. As a result, the backgrounds in no way suggest that the viewer should select a particular photograph. The court also acknowledged that Defendant was the only person who showed his teeth in his photograph, but found that each photograph had a unique characteristic. Accordingly, the viewer's eye is not attracted to one particular photograph. The court rejected Defendant's contention that the placement of Defendant's photograph in the top center of the lineup drew the viewer's eye to that particular picture. The court found that Defendant had not presented any evidence to support this contention. The court further found that there was no evidence that Gonzales was aware that an arrest was imminent and that other witnesses had been called to the police station to view lineups. Additionally, the court found that the fact that Gonzales viewed the lineup at night was insignificant. The court determined that there had not been a formal or rigid viewing schedule prior to the night in question. Instead, the testimony revealed that the prior meetings were arranged as schedules and Gonzales' medical condition permitted. The court also found that there was no evidence that Gonzales' identification was affected by the viewing of the lineup in a different format than before. Although Gonzales may have only viewed photographs in a book, his identification was not affected by viewing the six picture photographic lineup presented to him. The court also rejected Defendant's contention that a physical lineup would have been more trustworthy and should have been conducted. The court noted that Gonzales had never been asked to view a physical lineup in the past, and the court opined that a physical lineup would have drawn more attention to the importance of that particular viewing. The court also surmised that the police did not have adequate time to locate men who had similar physical characteristics to conduct a physical lineup given all of the circumstances. Based on the foregoing, the court concluded that the lineup and the procedures utilized in displaying the lineup were not unduly suggestive.

This court first notes that the findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001). Absent a showing by Defendant that the evidence preponderates against the judgment of the trial court, this court must defer to the ruling of the trial court. State v. Cribbs, 967 S.W.2d 773, 795 (Tenn.), *cert. denied*, 525 U.S. 932, 119 S. Ct. 343, 142 L. Ed. 2d 283 (1998).

As the trial court correctly espoused, the United States Supreme Court established a two-part test to assess the validity of a pretrial identification in Neil v. Biggers, 409 U.S. 188, 199-200 (1972). Specifically, the court must determine (1) whether the procedure used to obtain the identification was unduly suggestive and (2) if the identification was unduly suggestive, the court must determine,

under the totality of the circumstances, whether the identification is nevertheless reliable. Id. After a review of the record, this court must concur with the trial court's findings that the lineup and the procedures used in the lineup were not unduly suggestive. The evidence does not preponderate against the findings of the trial court. Defendant is not entitled to any relief on this issue.

## **7. Court hours**

Defendant contends that the trial court erred in holding "late night" court sessions in this case. Prior to trial, Defendant filed a "Motion for Reasonable Court Hours During Jury Selection and Trial." Defendant requested that court hours be limited to 9:00 a.m. to 5:00 p.m. The trial court ruled that the court hours would be the same as those held in Defendant's prior Davidson County case, in which Defendant was tried and convicted of the murders of two Captain D's employees. The following schedule was followed by the trial court:

### JURY SELECTION:

_____ May 15:	9:00 a.m. - Court called into session 7:15 p.m. - Court adjourned for the day
May 16:	9:00 a.m. - Court resumed 6:45 p.m. - Court adjourned for the day
May 17:	9:00 a.m. - Court resumed 8:00 p.m. - Court adjourned for the day
May 18:	9:00 a.m. - Court resumed 5:05 p.m. - Court adjourned for the day
May 19:	9:00 a.m. - Court resumed The record does not reflect the time court was adjourned. The trial court asserts that court was adjourned at 4:00 p.m.

### THREE DAY BREAK BETWEEN JURY SELECTION AND TRIAL

### TRIAL

May 22:	8:30 a.m. - Trial proceedings began; jury-out proceedings 10:00 a.m. - Jury brought into court 7:30 p.m. - Jury excused for the day 7:55 p.m. - Court adjourned for the day
May 23:	8:30 a.m. - Court resumed 7:30 p.m.- Jury excused for the day

7:50 p.m. - Court adjourned for the day

May 24: 8:30 a.m. - Court resumed  
 4:26 p.m. - Jury retired to jury room for deliberations  
 8:37 p.m. - Jury excused for the day  
 8:39 p.m. - Court adjourned for the day

May 25: 8:30 a.m. - Court resumed  
 8:53 a.m. - Jury retired to jury room for deliberations  
 8:50 p.m. - Jury returned to court to announce verdict  
 8:56 p.m. - Jury excused for the day  
 9:05 p.m. - Court adjourned for the day

May 26: 8:30 a.m. - Court resumed; jury-out hearing conducted  
 10:34 a.m.- Jury returned to open court for penalty phase testimony  
 7:25 p.m. - Jury excused for the day  
 7:55 p.m. - Court adjourned for the day

May 27: 8:30 a.m. - Court resumed; jury-out hearing conducted  
 8:42 a.m. - Jury returned to open court and penalty phase resumed  
 2:42 p.m. - Jury retired to the jury room for deliberations on the sentence  
 6:35 p.m. - Jury returned to open court and announced its sentence

In State v. Parton, 817 S.W.2d 28 (Tenn. Crim. App. 1991), this court addressed the issue of "late night" court sessions as follows:

It is clear in this state that late night court sessions should be scheduled "only when unusual circumstances require it." [*State v.*] *McMullin*, 801 S.W.2d [826], 832 [(Tenn. Crim. App. 1990)]. Regardless of whether counsel or any juror objects, the late night sessions should be avoided; and they must be justified because of unusual circumstances. If the requisite unusual circumstances do exist and late night sessions are scheduled because of necessity, good practice would be to also let the record affirmatively reflect that all counsel and all jurors expressly agree. But the threshold question which must always be determined by the court is whether the circumstances justify the unusual session.

Id. at 33.

In his appeal of his convictions and sentences of the Captain D' murders, Defendant argued that the trial court committed reversible error by holding late night court sessions. In that case, this court rejected Defendant's arguments. This court specifically found that the record did not support Defendant's argument that the court kept excessively late hours during trial, and the Tennessee

Supreme Court affirmed this court's decision and published that portion of the opinion as an appendix to its opinion. State v. Reid, 91 S.W.3d 247, 288, 300-01 (Tenn. 2002).

This court must conclude in this case, as well, that the record does not support the argument that the court kept excessively late night hours. In support of its decision to extend the court day beyond eight hours, the trial court explained that this case was a capital murder case that had received extensive media attention. As a result, the court had gone outside of the county to secure a jury, and the jury was required to be sequestered and "locked away from family, friends and employment until the conclusion of the trial." We do not find that the trial court abused its discretion in extending the court hours in this case beyond eight hours per day. Defendant is not entitled to relief on this issue.

## **8. Recusal**

Defendant contends that the trial court erred in denying his motion for recusal. Although Defendant makes several arguments for the recusal of the trial court, his arguments center on two allegations: The trial judge was not able to act impartially because she had presided over one of Defendant's previous capital murder trials; and the trial judge was biased with regard to Defendant's claim of incompetency. We have reviewed each of Defendant's allegations on this issue and determine that each is without merit.

First, Defendant asserts that because the trial judge had presided over his capital murder trial in the Captain D's case, there is a reasonable basis for a person of ordinary prudence to question the trial court's ability to render its duties with an appearance of impartiality. Defendant argues that much of the evidence in his two capital murder trials was very similar. Furthermore, Defendant notes that the trial judge had approved the verdict of death in the prior case. As a result, Defendant asserts that the trial judge was not able to act impartially as the thirteenth juror in this case. Defendant points to specific statements the trial judge made in the Captain D's trial regarding the weight of the evidence and Defendant's mental health proof to support this allegation. Defendant does not cite to any statements made by the trial court in the case at issue to support his allegation that the trial court could not act impartially as the thirteenth juror.

Next, Defendant asserts that the trial judge exhibited a bias in her rulings and actions at Defendant's competency hearing, which demonstrated that she was not reasonably impartial, as required by Tennessee Supreme Court Rule 10, Canon 3E(1). Defendant references the following six instances in which he alleges the trial judge did not act impartially at the competency hearing:

### **1. The trial court's initial comments**

Defendant filed a motion requesting a judicial determination of defendant's competency to stand trial on March 7, 2000, nine days before the jury selection was set to begin in Hamilton County. During the course of pretrial hearings, the court had questioned counsel for Defendant on several occasions as to whether competency was going to be an issue. Counsel for the defense



asserts that the motion for a determination of competency was not made for an improper purpose, but was made because counsel believed in good faith that Defendant's competency had become an issue. Defendant asserts that the trial judge began the hearing by stating that "it had extensive knowledge of Defendant's background" and indicated "its clear displeasure with the timing of the competency motion." Defendant cites to the following statements made by the trial court:

THE COURT: Okay. Now, okay, anything else we need to bring up before we do the hearing on Monday?

Okay. Now I think we need to have a few ground rules about what they need to be testifying to with regard to the competency issue. I am not starting from ground zero here. The issue is whether or not he is presently able to stand trial and not as a result of mental disease or defect, and we don't need a lot of testimony about his past history. I've heard a lot about that. I've read a lot of materials about it.

The issue is his condition now, and, you know, references, we don't have to go through a long discussion about childhood or any of that. It is going to be the point, what has changed, because clearly a year ago, he was competent. He was determined to be competent, though Dr. Auble might have disagreed with it, in August and in September.

The point of the matter is it is going to be recent information with regard to his present competence to stand trial, so we need to tailor and make sure it is on point as to that.

....

THE COURT: Well, again, you know we are going to keep this issue on point, and as to what I need to know, and it has to be some recent information. If they haven't see[n] Mr. Reid in six months, then, no, they are not going to testify. I mean, that is not going to be very helpful, you know, the State might want to call some of the guards, I mean, I don't know.

I'm going to determine his competence to stand trial, the present issue because it's got to be resolved one way or another, and it may be one of these continuing issues that I need to be dealing with because clearly, I'm not going to trial with somebody who is not competent. I'm not going to put the State to that expense, but at the same time, I'm not going to stop this trial because it is at the, shall we say, eleventh hour to bring up this issue. We are going to resolve it, and we are going to resolve it quickly, and that is pretty much all I have to say about that.

Defendant also contends that the trial court showed its bias in discussing the history of the competency issue from Defendant's prior trials and by stating that the court was not interested in "re-litigating Clarksville."

## 2. The court's actions regarding Dr. Caruso

The trial court ordered an independent evaluation of Defendant following the filing of the motion for a determination of competency. The court attempted to have Defendant evaluated by Vanderbilt University, the entity with whom the Department of Mental Health and Mental Retardation contracts to do competency evaluations in Davidson County, but was unsuccessful. Therefore, the court hired Dr. Keith Caruso, with whom the court had no prior experience, to perform an evaluation. Dr. Caruso testified at the competency hearing that Defendant was incompetent to stand trial, but could probably achieve competency by taking medications. Dr. Caruso's testimony followed Defendant's experts' testimony that Defendant was incompetent to stand trial and the State's expert's testimony that Defendant was competent to stand trial.

After hearing the testimony of the experts, the trial court referred Defendant to the Forensic Services Division of the Department of Mental Health and Mental Retardation and ordered the forensic evaluation team to conduct a competency evaluation, prepare a report, and advise the court regarding the appropriateness of providing Defendant with medication or other treatment. The Department of Mental Health and Mental Retardation's evaluation team determined that Defendant was competent to stand trial and testified so at the competency hearing. Following the testimony of the evaluation team, Defendant requested permission to call Dr. Caruso to rebut the department's testimony. The court denied the request. The court then ruled that Defendant was competent to stand trial, stating that "it's not even a close issue."

Defendant asserts that the court must have rejected the testimony of Dr. Caruso, whom the court hired as an independent evaluator, to reach its ruling that Defendant was competent. Defendant further asserts that the court showed bias in denying the defense request to call Dr. Caruso to testify in rebuttal. As a result, Defendant contends that "[t]hese circumstances indicate that the trial court either lost its impartiality regarding the competency issue or was biased against defense counsel's position."

## 3. The trial court's actions regarding Dr. Martell

Defendant asserts that he was given insufficient time to prepare for the cross-examination of Dr. Daniel Martell, who testified on behalf of the State at the competency hearing. In the trial court's order denying recusal, the court explained that Dr. Martell, who lives in California, was in Nashville for a deposition in an unrelated capital case during the time of the competency hearing. Dr. Martell arrived in Nashville on March 14, 2000, and on that night, evaluated Defendant and his competency to stand trial. The court contacted the federal judge who was supervising the other matter and requested that the State be permitted to "borrow" Dr. Martell so he could present testimony in this case during a lunch break. Dr. Martell did not have time to prepare a written report

of his findings prior to his testimony. Defense counsel requested that Dr. Martell's testimony be deferred until he could prepare a written report. The trial court refused to delay the testimony. In denying the defendant's request, the court noted that exigent circumstances existed due to the filing of the competency motion so close to the selection of the jury. The court acknowledged that the defense did not have as much time to prepare for Dr. Martell's testimony, but stated that the State hadn't had much time to prepare either. Defendant asserts that the trial court's comments indicate an appearance of bias against the defense's position.

#### 4. The trial court's actions regarding Dr. Amador

During the competency proceedings, Defendant moved to have Dr. Xavier Amador testify on Defendant's behalf. The court denied the request. The court had previously approved funds for Dr. Amador to evaluate Defendant's competency, but the court rescinded its previous ruling. The court explained that it had previously approved some funds in the abstract, to keep a monitor on Defendant's condition, but that had not occurred. Dr. Amador had not seen Defendant in six months. Defendant had been evaluated by a defense expert, would be evaluated by an expert on behalf of the State, and would be evaluated by an independent expert. Accordingly, the court determined that there was no reason to have Dr. Amador evaluate Defendant currently. The court further explained that time was of the essence. The court also noted that Supreme Court Rule 13 did not permit it to hire a second expert, especially an out-of-state expert. Defendant argues, however, that the court had approved funds for Dr. Amador previously in this case and in the Captain D's case; therefore, a person of ordinary prudence would question whether the court's ruling was due to bias against the defense position or prejudgment by the court on the issue of competence.

#### 5. The trial court's finding regarding malingering in the Captain D's trial

Defendant asserts that the court determined in the Captain D's trial that he was malingering mental illness. As a result, he asserts that "there is no way that the trial court could have impartially assessed Defendant's competency in the present case."

#### 6. The trial court's disparate questioning of the parties' respective mental health experts

Defendant asserts as a final claim on this issue that the trial court showed bias against Defendant in the length and nature of its questioning of his mental health expert. Defendant asserts that the trial court challenged his mental health expert and Dr. Caruso, both of whom testified that he was incompetent to stand trial. In contrast, Defendant asserts that the court's questioning of the State's expert and the evaluation team experts was minimal and did not question their findings. As a result, Defendant argues that the trial court was not impartial during the competency hearing.

Initially, this court notes that a motion to recuse is addressed to the sound discretion of the trial court. Parton, 817 S.W.2d at 30. A trial court's ruling on recusal will not be reversed on appeal absent a clear abuse of discretion. Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). Generally, "[w]hen a trial judge has no doubt of his ability to preside fairly over the matters

presented, there is no need to grant a motion for recusal." Johnson v. State, No. 83-241-III, 1988 WL 3632 (Tenn. Crim. App. at Nashville, Jan. 20, 1988), *aff'd in part. rev'd in part*, 797 S.W.2d 578 (Tenn. 1990). However, the standard is ultimately an objective one. Thus, recusal is warranted "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). The standard of review on appeal is whether the trial court abused its discretion by denying the motion. State v. Cash, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993).

Tennessee Supreme Court Rule 10, Cannon 3(E) provides: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." However, prior knowledge of facts about the case is not sufficient in and of itself to require disqualification. Alley, 882 S.W.2d at 822. Moreover, a judge is in no way disqualified merely because she has participated in other legal proceedings against the same person. King v. State, 216 Tenn. 215, 391 S.W.2d 637, 642 (1965). See also State v. Demodica, No. 99, 1990 WL 21233 (Tenn. Crim. App., Knoxville), *perm. app. denied*, (Tenn.1990). The supreme court has observed that "[j]udicial knowledge upon which a decision may be based is ... the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role." Vaughn v. Shelby Williams of Tennessee, Inc., 813 S.W.2d 132, 133 (Tenn. 1991).

Based on the foregoing, Defendant's assertions that the trial judge could not act impartially because she had tried his previous capital murder case must fail. Defendant has not convinced this court that the judge's participation in Defendant's previous capital murder trial caused her to be biased against Defendant or colored her rulings in this case in any regard.

Defendant's assertions that the trial judge was biased in her actions and rulings at Defendant's competency hearing must also fail. This court notes that adverse rulings by a court are not usually sufficient grounds to establish bias. Alley, 882 S.W.2d at 821. Moreover, "[t]he issue to be determined is not the propriety of the judicial conduct of the judge, but whether [she] committed an error which resulted in an unjust disposition...." State v. Hawk, 688 S.W.2d 467, 472 (Tenn. Crim. App. 1985). We conclude that the judge's remarks and actions at the competency hearing did not indicate partiality on the part of the trial court and did not warrant recusal. Defendant is not entitled to relief on this issue.

## **9. Testimony of Joe Ingle**

At Defendant's competency hearing, Defendant called Reverend Joe Ingle as a witness. Reverend Ingle has served as Defendant's pastor since June 1997, the month he was arrested. The trial court ruled that Reverend Ingle could not testify as to his conversations with Defendant because Defendant had not waived his priest-parishoner privilege. The court allowed Reverend Ingle to

testify as to his general impressions of Defendant. Defendant asserts that the trial court erred in limiting Reverend Ingle's testimony. Specifically, Defendant contends that because he was incompetent, and should have been presumed incompetent by the trial court, he was also incompetent to assert the priest-parishoner privilege. Accordingly, Reverend Ingle's testimony should not have been limited.

In the appeal of his Montgomery County convictions, Defendant argued that the trial court erred in excluding the testimony of Reverend Ingle. Our Supreme Court rejected Defendant's arguments as follows:

In our view, the trial court did not err in excluding the testimony. First, our conclusion that a defendant bears the burden of establishing his or her incompetency necessarily means that he or she has not been found to be incompetent before or during the competency proceeding itself. As a result, nothing prevents a defendant from invoking an applicable privilege during a competency proceeding as a matter of law. Moreover, the trial court is free to reconsider the issue of the defendant's invocation of privileges while evidence of the defendant's mental status is presented during the hearing by both the defense and prosecution.

Second, a defendant's right to present evidence to meet the burden of proof does not eliminate the trial court's discretion in determining relevance and materiality of the evidence. Here, the defendant presented extensive expert testimony to show that he was not competent to stand trial. The expert witnesses related the basis of their opinions, which included analysis of the defendant's family background, history of head injuries, and mental illness. . . . In sum, the defendant's exercise of his privileges did not prevent the trial court from fully considering the material evidence and making a thorough assessment of the relevant issues pertaining to the defendant's competency to stand trial. Accordingly, we conclude that the trial court did not err in excluding the testimony of the witnesses.

State v. Reid, 2005 WL 1219263, at \* \_\_\_\_\_. After a review of the evidence in this case, and based upon the above-quoted rationale of the Supreme Court, we conclude that the trial court did not err in limiting the testimony of Reverend Ingle. Defendant is not entitled to relief on this issue.

#### **10. Testimony of Maureen McGinley**

Defendant sought to introduce the testimony of Maureen McGinley at the competency hearing. Ms. McGinley served as Defendant's jury consultant during the Captain D's murder trial in April 1999. Ms. McGinley had not had any contact with Defendant following that trial. Yet, Defendant wanted to elicit testimony from her regarding his actions during April 1999 to buttress his contention that he was incompetent to stand trial in this case.

As this court has explained, a hearing to determine if a defendant is competent to stand trial does not focus on the defendant's guilt or innocence or even the defendant's mental condition at the time of the crime. Instead, a competency hearing is "a very narrow inquiry aimed at determining whether one who is charged with a criminal offense is presently competent to stand trial." State v. Stacy, 556 S.W.2d 552, 553 (Tenn. Crim. App. 1977). The testimony of Maureen McGinley as to Defendant's conduct during his April 1999 trial has not been shown to be relevant to the issue of Defendant's competency at the time of the hearing in this case. Moreover, a memorandum authored by Ms. McGinley was admitted into the record and considered by the trial court. The memorandum set forth Defendant's behavior during his April 1999 trial. Defendant is not entitled to relief on this issue.

#### **11. Testimony of Carla Crocker**

Defendant also contends that the trial court erred in excluding the testimony of Carla Crocker, the Public Affairs Officer for the Davidson County Sheriff's Office, from his competency hearing. Ms. Crocker would have testified that in March 1999, Defendant attempted to call a press conference in which he intended to discuss a dispute with the sheriff's office involving an allegation that a chicken bone had been found in his cell. In excluding Ms. Crocker's testimony, the court concluded that (1) the event was too remote in time and was therefore not relevant and (2) the court had prevented the press conference by issuing a gag order. Defendant admitted that Ms. Crocker had not had any contact with Defendant since the incident in March 1999.

We conclude that Ms. Crocker's testimony was not relevant to Defendant's current competency. See Tenn. R. Evid. 401. We cannot determine that the trial court erred in excluding the testimony of Carla Crocker. Defendant is not entitled to relief on this issue.

#### **12. Denial of funds for evaluation of Defendant by Dr. Xavier Amador**

As has been previously discussed, during the competency proceedings Defendant moved to have Dr. Xavier Amador testify on Defendant's behalf. The court denied the request. The court had previously approved funds for Dr. Amador to evaluate Defendant's competency, but the court rescinded its previous ruling. The court explained that it had previously approved funds in the abstract for Dr. Amador, to keep a monitor on Defendant's condition, but the monitoring had not occurred. Dr. Amador had not seen Defendant in six months. Defendant had been evaluated by a defense expert, would be evaluated by an expert on behalf of the State, and would be evaluated by an independent expert. Accordingly, the court determined that there was no reason to have Dr. Amador evaluate Defendant currently. The court further explained that time was of the essence. The court also noted that Supreme Court Rule 13 did not permit it to hire a second expert, especially an out-of-state expert.

Defendant argues that the trial court's ruling "might have made sense" if the court had rendered a decision on the testimony of Dr. Auble, Dr. Martell, and Dr. Caruso. However, Defendant asserts that once the court secured a second independent evaluation of Defendant, the

court was obligated to provide funds to enable Dr. Amador, who had extensive experience with Defendant, to perform an evaluation. Defendant cites to no case law to support his assertion that the court was obligated to provide funds for Dr. Amador once the court sought a second independent evaluation. Defendant further contends that the trial court's ruling constitutes a denial of his right to call witnesses on his own behalf, as well as his rights to due process and a fair trial.

Defendant's assertions are not supported by statute or case law. Tennessee Code Annotated Section 40-14-207 provides that in capital cases where a defendant has been found indigent, the court may, in its discretion, determine that expert services are necessary to ensure that the constitutional rights of the defendant are protected. The Supreme Court has analyzed section 40-14-207 of the Tennessee Code and has held that it does not entitle a defendant to an expert of his choice. Rather, an indigent defendant must be provided with the tools necessary to present an adequate defense. State v. Smith, 857 S.W.2d 1, 12 (Tenn. 1993). The court provided funds for Defendant to obtain the services of Dr. Pamela Auble. Dr. Auble, unlike Dr. Amador, had maintained a continuous relationship with Defendant. Moreover, Dr. Amador's practice was in New York, and Defendant did not demonstrate the need for an out-of-state expert as contemplated by Supreme Court Rule 13.

Based on the foregoing, we conclude Defendant is not entitled to relief on this issue.

### **13. Denial of continuance of competency hearing**

As has been previously set forth, Defendant contends that the trial court erred in denying his request to defer the testimony of state expert Dr. Daniel Martell until such time as he had prepared his written report and defense counsel had the opportunity to review the report with the aid of their experts. Specifically, Defendant asserts that he was given insufficient time to prepare for the cross-examination of Dr. Martell. The circumstances surrounding Dr. Martell's evaluation and testimony are as follows. Dr. Martell, who lives in California, arrived in Nashville on March 14, 2000, and evaluated Defendant and his competency to stand trial that night. Dr. Martell had actually traveled to Nashville to participate in a deposition in an unrelated capital case. The trial court contacted the federal judge who was supervising the other matter and requested that the State be permitted to "borrow" Dr. Martell so he could present testimony in this case during a lunch break. Dr. Martell did not have time to prepare a written report of his findings prior to his testimony. As a result, defense counsel requested that Dr. Martell's testimony be deferred until he could prepare a written report and counsel had been given adequate time to review the report with the aid of experts. The trial court refused to delay Dr. Martell's testimony. In denying Defendant's request, the court noted that exigent circumstances existed due to the filing of the competency motion so close in time to the selection of the jury. The court acknowledged that the defense did not have much time to prepare for Dr. Martell's testimony, but stated that the State did not have much time to prepare either.

Defendant asserts that his counsel was not given an opportunity to investigate the evidence provided by Dr. Martell prior to its admission. Defendant notes that to provide effective representation, counsel must conduct appropriate factual and legal investigations. Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002); Baxter v. Rose, 523 S.W.2d 932, 935 (Tenn. 1975). While

counsel was not provided with Dr. Martell's report prior to his testimony, counsel received Dr. Martell's notes from the evaluation and met with Dr. Martell about his findings. Further, Defendant has not demonstrated any harm resulting from the court's ruling on this issue. Given the unique circumstances surrounding Dr. Martell's evaluation and testimony, we determine that the trial court did not abuse its discretion in denying a continuance of the competency hearing.

#### **14. Testimony of Dr. Daniel Martell as expert in the field of psychology**

Defendant contends that the trial court erred in allowing Dr. Martell to testify as an expert in the field of forensic neuropsychology because he is not licensed to practice psychology in the State of Tennessee. During cross-examination, defense counsel asked Dr. Martell if he had evaluated Defendant with regard to the issue of competency as a psychologist. Dr. Martell responded that he had. The trial court concluded, however, that Dr. Martell had performed a forensic evaluation of Defendant's competence and had not engaged in the practice of psychology as defined by Tennessee Code Annotated Section 63-11-211(b)(5).

The Supreme Court addressed the same issue in Coe v. State, 17 S.W.3d 193 (Tenn. 2000). The Supreme Court determined in that case that Dr. Martell had performed a forensic evaluation, which did not constitute the practice of psychology under Tennessee Code Annotated Section 63-11-203(a) and therefore no authorization was required by Tennessee Code Annotated Section 63-11-211(b)(5). Id. at 224-25. In reaching its decision, the Supreme Court explained that the only purpose of Dr. Martell's evaluation was to determine whether Coe was competent. Dr. Martell's evaluation "was not for the purpose of 'preventing or eliminating' any psychological illness of [Coe] and 'enhancing' his mental health. Therefore, the performance of the forensic evaluation did not constitute the practice of psychology." Id. at 225. The same is true in this case. Although Dr. Martell testified that his examination of Defendant was "the practice of psychology," the purpose of Dr. Martell's examination of Defendant was to determine his competency to stand trial. The examination was not for the purpose of preventing or eliminating any psychological illness of Defendant and enhancing his mental health. See Tenn. Code Ann. § 63-11-203(a) defining the "practice of psychologist." Accordingly, Dr. Martell's evaluation did not constitute the practice of psychology. The trial court did not err in allowing Dr. Martell to testify as an expert witness. Defendant is not entitled to relief on this issue.

#### **15. Second court-ordered evaluation of defendant and monitoring by Dr. Farooque**

Following testimony by Defendant's expert, the State's expert, and the court-appointed mental health expert at the competency hearing, the court ordered a second evaluation of Defendant. The court found the testimony of the three experts to be conflicting and determined that a second evaluation of Defendant by a court-appointed expert was necessary. The court based its reasoning in part on the fact that it questioned the credibility of Dr. Caruso, the independent expert it had previously appointed.



Dr. Caruso's written report stated that he had to remind Defendant during his evaluation that the insanity defense was available to him. However, Defendant was being evaluated for the purposes of competency to stand trial, not insanity at the time of the crimes. Following his testimony, Dr. Caruso sent a fax to the court explaining that he may have unintentionally misstated Defendant's knowledge of his charges in his report and in his testimony before the court. The court found that Dr. Caruso's report lacked credibility due to the fact that his finding that Defendant was unaware of the charges against him could not be verified by the tape recordings Dr. Caruso made, as the tape recorder had malfunctioned during that portion of the interview. Additionally, the court questioned Dr. Caruso's credibility because he submitted a bill to the court in an amount of \$20,250 for his evaluation of Defendant, when he had agreed to accept a fee of \$7,500.

Tennessee Code Annotated Section 33-7-301 sets forth the procedure a court must undertake in appointing a competency expert. The Code, however, sets forth no procedure for the court to follow when it questions the credibility of the expert it has appointed under the Code. It is quite obvious that the court questioned the credibility of the expert it had appointed. Defendant asserts that because Tennessee Code Annotated Section 33-7-301 does not specifically provide that the court may order a second evaluation, the court erred in doing so. However, we cannot agree.

Given the circumstances of this case, we find it was within the trial court's discretion to order a second evaluation. Defendant surmises that the court ordered the second evaluation because the court did not approve of the opinion given by Dr. Caruso. However, the court explained that it had absolutely no interest in trying any incompetent defendant, especially one whose life was at stake. The court, however, felt it was necessary for Defendant to undergo a second evaluation, given the conflicting testimony by the three experts. Moreover, Dr. Caruso had opined that although he believed Defendant was currently incompetent, he may become competent with the use of medication. Therefore, the court instructed that the second evaluation include recommendations regarding the need for medication. Given these circumstances and the fact that the court questioned the credibility and accuracy of the court-appointed expert, the court did not err in ordering a second evaluation of Defendant.

Similarly, Defendant argues that the trial court erred in designating Dr. Rokeya Farooque to monitor Defendant's competency following the competency hearing. Defendant submits that the trial court had no legal authority to appoint an independent evaluator after it appointed Dr. Caruso. However, as set forth above, given the circumstances of this case, we find no error in the continued monitoring of Defendant by Dr. Farooque and the MTMHI forensic staff. As the trial court explained in its order denying Defendant's motion for new trial, the court had not had any discussions with Dr. Caruso concerning continued monitoring of Defendant following the competency hearing. Although Dr. Caruso had agreed to evaluate Defendant for a fee of \$7,500, he sent a request for payment on the amount of \$20,250. As a result, the trial court determined that it should not employ a private psychiatrist when a qualified forensic team from a state hospital was available. Defendant has failed to set forth any prejudice that resulted from the trial court's order that Dr. Farooque monitor Defendant's competence throughout trial.

Defendant is not entitled to relief on this issue.

#### **16. Rebuttal testimony of Dr. Caruso**

Defendant submits that the trial court erred in refusing to allow Dr. Caruso to offer rebuttal testimony following the testimony by the evaluation team as to its evaluation of Defendant. However, the court allowed Dr. Auble, Defendant's designated expert, to testify on rebuttal. Moreover, the court had stated in open court and through its written orders that it questioned the credibility and accuracy of Dr. Caruso and his findings.

The issue of whether to allow rebuttal testimony, as well as the scope of that testimony, lies within the sound discretion of the trial court. State v. Thompson, 43 S.W.3d 516 (Tenn. Crim. App. 2000). The court's ruling on this issue will not be overturned absent a clear abuse of discretion. State v. Kendricks, 947 S.W.2d 875, 884 (Tenn. Crim. App. 1996). The trial court found that Defendant was not prejudiced by the court's refusal to allow the rebuttal testimony of Dr. Caruso, and Defendant has failed to show on appeal how he was prejudiced by the court's ruling that Dr. Caruso could not testify in rebuttal to the testimony of the evaluation team from MTMHI. After a review of the record, we cannot determine that the trial court abused its discretion in refusing to allow Dr. Caruso to testify on rebuttal at the competency hearing. Defendant is not entitled to relief on this issue.

#### **17. Competency of Defendant to stand trial**

The test for determining whether a defendant is competent to stand trial is whether Defendant has "the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense." State v. Black, 815 S.W.2d at 173-74; Mackey v. State, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975); see also Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The Supreme Court has recently held that a defendant bears the burden of proving incompetency by a preponderance of the evidence. Reid, 2005 WL 1219263, at \* \_\_\_\_\_. At the time this case was tried, the Supreme Court had never addressed the precise issue of which party bore the burden of proof at a competency hearing. See id. at \* \_\_\_\_\_. As a result, the trial court in this case analyzed the evidence under both standards and determined that Defendant was competent, regardless of who bore the burden of proof. The "findings of the trial court are conclusive on appeal unless the evidence preponderates otherwise." Oody, 823 S.W.2d at 559 (citing Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973)).

After extensive hearings in this case, the trial court found Defendant competent to stand trial. The court based its findings on the testimony and reports of the experts and testimony of the lay witnesses, but found Defendant's "own words" during his interview with Dr. Caruso, most of which was recorded, "particularly helpful in understanding [Defendant's] mental state." The court found that during Defendant's interview with Dr. Caruso, Defendant had an understanding of, *inter alia*: the charges against him; the possible penalties; the respective roles of judge and jury; the difference in procedure in capital and non-capital cases; the role of evidence in a trial; and the specific evidence

against him in the McDonald's proceedings. The court also found that Defendant was able to consult with counsel and assist in preparing his defense. Furthermore, the court stated that the tapes establish that Defendant believed his attorneys were "killing him with their incompetence," rather than believing that they were actually trying to kill him as a part of a government conspiracy. Moreover, in the order denying Defendant's motion for new trial on this issue, the court noted that Defendant had been very attentive during the trial and had worked to assist his attorneys during the jury selection proceedings.

During the competency hearing, Dr. Pamela Auble and Dr. Keith Caruso testified that Defendant was not competent to stand trial, whereas Dr. Daniel Martell and Dr. Samuel Craddock and the other members of the MTMHI evaluation team testified he was competent to stand trial. Dr. Auble testified that Defendant suffered from delusions. She explained that she first began to question Defendant's competency following Defendant's convictions in the Captain D's murders because Defendant abruptly decided not to present mitigating proof at the sentencing hearing. Dr. Auble admitted that Defendant eventually agreed that his counsel could present mitigating proof, and the same was presented on his behalf. During this time, Defendant advised her that he believed the government had attempted to kill him on three occasions, the last of which was the government's framing of him for the murders in Tennessee. Dr. Auble concluded that Defendant did not have the present ability to consult with his attorneys with a reasonable degree of rational understanding, lacked a rational and factual understanding of the proceedings against him, and did not have the mind and discretion to enable him to appreciate the charges against him and to present a proper defense. She further explained that Defendant suffered from anosognosia, which also interfered with his rational understanding of his case. She acknowledged that Defendant understood courtroom procedure and understood the roles of judge, jury, prosecutor, and defense attorneys in an abstract way. She also admitted that Defendant had previously been diagnosed with malingering, but denied that he was currently malingering.

Dr. Daniel Martell testified on behalf of the State. Dr. Martell testified that at his most recent interview with Defendant, Defendant was not experiencing any hallucinations or delusions. Dr. Martell further testified that Defendant advised him that his attorneys had decided to present a mental illness defense because he had been convicted at his first trial. Dr. Martell explained that Defendant advised that he believed the prosecutor was attempting to manufacture evidence against him by making the murders at Captain D's and McDonald's appear similar. Defendant referred Dr. Martell to discrepancies in the evidence in the Captain D's trial as proof of his belief. Defendant told him that at the preliminary hearing in the Captain D's trial, the police and medical examiner testified that the shots to the Captain D's victims had been to the body. At trial, however, the prosecutor found a second medical examiner who testified that the shots had in fact been to the head. Defendant believed that the change in testimony resulted from the prosecution attempting to show that the murders in the Captain D's and McDonald's cases were similar. Dr. Martell also testified that Defendant had advised that he could not trust his attorneys because they were not doing the best job they could do. Dr. Martell explained that he did not believe that Defendant thought that his attorneys were actually trying to kill him, but rather they were "killing him through incompetence." Dr. Martell testified that Defendant has a personality disorder that makes him a very difficult

individual to work with. He explained that Defendant was frustrated with his attorneys' performance, but the frustration did not rise to the level of paranoia.

Dr. Martell opined that Defendant did not suffer from a mental illness that would render him unable to understand the legal process. In fact, Dr. Martell concluded that Defendant had an "acute understanding" of the trial procedures and the post-conviction process. He further testified that Defendant understood the roles of the judge, jury, defense attorneys, and prosecutors. Dr. Martell also testified that Defendant understood that he had been charged with a capital offense.

Dr. Keith Caruso testified as an independent examiner. He concluded that Defendant was not competent to stand trial. Dr. Caruso diagnosed Defendant with schizo-affective disorder. He testified that he did not believe Defendant was malingering, but instead believed that Defendant attempted to appear more normal than he was. He testified that he did not believe that replacing Defendant's attorneys would restore his competency. He did believe, however, that Defendant's competency might be restored with medication.

Dr. Caruso further testified that in some of his meetings with Defendant, Defendant had discussed the evidence against him and the defense strategy. Defendant further explained to him why he did not want to present mitigation proof at trial. As a result, Dr. Caruso admitted that Defendant had an understanding of court procedure, the parties' roles, and the purpose of the competency proceedings. Dr. Caruso testified that Defendant's inability to consult with his defense attorneys was the most crucial element of his incompetency.

Dr. Caruso was also questioned by the court regarding his opinion. Dr. Caruso testified that Defendant had an understanding of the charges against him and the nature of the legal proceedings. Dr. Caruso explained, however, that Defendant did not believe that the legal system will operate in a meaningful way in his case. He further testified that Defendant understood the possible penalties and could discuss his defenses. When the court questioned Dr. Caruso as to how he and Dr. Martell could have come up with different opinions when they met with him during the same time frame, Dr. Caruso explained that Defendant's moods change often and his thought disorder may be associated with his condition at the time. Therefore, his lucidity may change from hour to hour.

Dr. Samuel Craddock testified as an independent mental health expert. According to Dr. Craddock, Defendant conversed with him in a rational manner during their interviews. Defendant advised Dr. Craddock that he was "definitely 100 percent ready to proceed with his trial, that he feels confident in himself." Dr. Craddock testified that in his professional opinion, Defendant was competent to stand trial. He based his opinion on the following: "My opinion and that of the evaluation team members is that he understands the seriousness of the charges that he has against him, that we think that he can participate in his defense, that he has a factual understanding of the seriousness of the charges. He has a rational understanding of how he might go about defending himself, and he says that he is willing to cooperate with his attorneys in trying to achieve the best possible outcome." Dr. Craddock further explained that there are features of his personality that severely interfere with his ability to work with his attorneys. Dr. Craddock testified that "Mr. Reid

has a strong desire to show his competence in whatever area it may be, that he does not like to surrender his individuality. He is an independent person who likes to be in control, and when his control is taken away from him he engages in a variety of activities that are not conducive to working with his attorney." Dr. Craddock testified that he believed that Defendant had been mentally ill in the past and had been incompetent in the past. Dr. Craddock testified that he disagreed with the diagnoses of Drs. Auble and Caruso because Defendant did not present symptoms of mental illness during his evaluation. Dr. Craddock further opined that he believed at times Defendant had exaggerated his mental well-being, while at other times he had exaggerated his mental illness. Dr. Craddock testified that Defendant had expressed a distrust of his attorneys, but at the same time Defendant told him that he was willing to cooperate and work with his counsel. While Dr. Craddock admitted that Defendant had a history of expressing delusional beliefs, he did not believe that Defendant was currently delusional. He did not believe that delusional beliefs influenced his day-to-day behavior, particularly with respect to competency.

Following the proof, the trial court assessed the testimony of each of the witnesses and ultimately found Defendant was competent to stand trial. We note that when a trial court conducts a hearing, it has the opportunity to see and hear the witnesses and their conflicting testimony. The trial court's findings have the weight of a jury verdict on appeal. State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981).

After a review of the record before us, we do not find that the trial court's determination that Defendant was competent to stand trial was erroneous. The trial court's findings are supported by the evidence. The trial court did not abuse its discretion in finding Defendant competent to stand trial. Defendant is not entitled to relief on this issue.

## **18. Defense counsel's motion to withdraw**

Following the competency hearing, defense counsel moved for withdrawal of further representation of Defendant. Defense counsel asserted that they could not effectively represent Defendant because he did not trust them and believed that they were trying to kill him. The trial court denied the motion. The trial court noted that Defendant's main complaint with his attorneys was that they had focused too much time on the competency and penalty phases, rather than the guilt phase. The court determined that any attorneys in their stead would pursue the same strategy. The court also noted that it was not uncommon for defendants to disagree and be dissatisfied with their attorneys. The court pointed out that Defendant's attorneys were very well acquainted with the facts of the case and Defendant's mental health and family history. Accordingly, the court found that Defendant's current attorneys were uniquely qualified to represent Defendant in this capital murder trial. The court determined that the replacement of Defendant's attorneys was not warranted and denied the motion.

Tennessee Code Annotated Section 40-14-205 provides that the court may allow an appointed attorney to withdraw upon good cause shown. The trial court's decision on withdrawal in a pending criminal matter rests within the sound discretion of the trial court and will not be

reversed on appeal absent an abuse of discretion. State v. Branam, 855 S.W.2d 563, 566 (Tenn. 1993); State v. Russell, 10 S.W.3d 270, 274 (Tenn. Crim. App. 1999). At the time of Defendant's trial, Tennessee's Code of Professional Responsibility was in effect. See Tenn. S. Ct. R. 8 (2000). Under the Code of Professional Responsibility, mandatory withdrawal of an attorney from representation is required when:

(1) The lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for the client, merely for the purpose of harassing or maliciously injuring any person.

(2) The lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.

(3) The lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment effectively.

(4) The lawyer is discharged by his client.

Tenn. S. Ct. R. 8, DR 2-110(B). None of the instances requiring mandatory withdrawal is present in this case. Accordingly, mandatory withdrawal was not required. Defendant asserts, however, that permissive withdrawal was warranted by DR 2-110(C)(1)(d), which provides that counsel may request withdrawal because the client "[b]y other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." Tenn. S. Ct. R. 8, DR 2-110(C)(1)(d). On appeal, Defendant contends that his relationship with his attorneys was compromised to a degree that made counsel's effective representation of him impossible. As a result, Defendant contends that the trial court erred in denying counsel's motion to withdraw. We conclude, however, that the trial court did not err in denying counsel's motion to withdraw, given the circumstances of this case.

In this case, the court found that counsel were uniquely qualified to represent Defendant. The Tennessee Supreme Court has stated that "[t]he advantage of familiarity with [a] case will generally outweigh any possible advantages to be gained in the fresh viewpoint of successor counsel." Parton v. State, 455 S.W.2d 645, 650 (Tenn. Crim. App. 1970). Defense counsel's motion to withdraw was made with two weeks remaining until jury selection was set to begin. Defendant would have been adversely affected if the court had allowed withdrawal of counsel at such a late date. Moreover, as the trial court noted, the appointment of new counsel would not have resolved the issues Defendant had with his attorneys concerning what he believed was his best trial strategy.

We further note that subsequent to Defendant's trial, Tennessee adopted the Rules of Professional Conduct. See Tenn. S. Ct. R. 8, RPC (2003). Under the Rules of Professional Conduct, withdrawal of representation by counsel is mandatory where continued representation will result in a violation of the Rules of Professional Conduct or other law, where counsel's physical or mental condition materially affects his ability to represent the client, or where counsel is discharged by the

client. Tenn. S. Ct. R. 8, RPC 1.16. Further, counsel may withdraw from representation of a client if the withdrawal can be accomplished without material adverse effect on the interests of the client, or if: the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent; the client uses the lawyer's services to perpetrate a crime or fraud; the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and the client has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; the representation will result in an unanticipated and substantial financial burden on the lawyer or has been rendered unreasonably difficult by the client; other good cause for withdrawal exists; or the client agrees to the withdrawal of the lawyer in writing. *Id.* The Rules of Professional Conduct were not in effect until March 1, 2003, and thus were not applicable at the time of Defendant's trial. However, we determine that even if this case were remanded for a new trial and tried under the new Rules of Professional Conduct, mandatory withdrawal would not be required, given the same set of circumstances. Moreover, permissive withdrawal of defense counsel in this instance would have resulted in a material adverse effect on the interests of Defendant. Accordingly, assuming *arguendo* that it was error on the part of the trial court to deny counsel's motion to withdraw, such error would be harmless in light of the new Rules of Professional Conduct. A new trial would not give Defendant any benefit. As the trial court noted, appointment of new counsel would not have resolved the issues Defendant had with defense counsel. As a result of the foregoing, the trial court did not abuse its discretion in denying defense counsel's motion to withdraw.

#### **19. "Religious tests" in voir dire**

Defendant contends that the exclusion of jurors who express religious objections to the death penalty constitutes a religious test, which is prohibited by Article I, Section 6 of the Tennessee Constitution. Defendant filed a motion to prohibit the use of this "religious test," which the trial court denied. Defendant acknowledges that the Tennessee Supreme Court has held that the exclusion of jurors who express religious objections to the death penalty is not a religious test, *per se*, citing State v. Jones, 789 S.W.2d 545, 547 (Tenn. 1990).

Moreover, the Supreme Court affirmed this court's holding in defendant's prior appeal of the Captain D's murders in State v. Reid, that the exclusion of prospective jurors by a trial court because of their moral or religious based reluctance to impose the death penalty is not error. State v. Reid, 91 S.W.3d 247, 289-90 (Tenn. 2002). "In this regard, potential jurors are removed for cause not because of their religious opinion or affiliation but because the jurors are unable to view the proceedings impartially and perform their duties in accordance with the juror's oath." *Id.* at 290. Questioning of a juror with regard to the death penalty does not amount to a religious test. *Id.* (citing Wolf v. Sundquist, 955 S.W.2d 626, 631 (Tenn. App.), *perm. app. denied*, (Tenn. 1997)). Defendant acknowledges that the Tennessee Supreme Court has rejected this argument, but makes the argument in order to preserve it for later review. See State v. Edwin Gomez, \_\_\_\_ S.W.3d \_\_\_\_, No. M2002-01209-SC-R11-CD, 2005 WL 856848, \*13 (Tenn. April 15, 2005) ("Indeed, a defendant is never precluded from raising an issue simply because a prior decision has rejected it."). Defendant is not entitled to relief on this issue.

**20. Instruction to venire that some aggravating factors relate to circumstances of the victim**

Defendant contends that the trial court erred when it stated to the first panel of potential jurors, in giving general instructions about the nature of a capital case, that aggravating circumstances are specifically defined by the legislature and "relate to circumstances about the crime or circumstances about the victim." Defendant asserts that this statement could have misled the jury into believing that victim impact evidence constituted an aggravating circumstance. Defendant admits that several of the aggravating circumstances relate to circumstances of the victim. However, Defendant submits that the court must state the law fully and accurately, and this statement by the court may have misled the jury. Defendant further admits that the trial court later properly instructed the jury that victim impact evidence is not the same thing as an aggravating circumstance. However, Defendant submits that the proper instruction only served to heighten the jury's confusion.

Defendant failed to enter a contemporaneous objection to the trial court's statement; therefore, this issue is waived for purposes of appeal. Tenn. R. App. P. 36(a). Moreover, in the same general instruction to the panel of potential jurors, the trial court instructed the jury that they must rely on the aggravating circumstances delineated by the legislature, that they could not make up their own aggravating circumstances, that the court would tell them what the potential aggravating circumstances were, that they would have to unanimously agree that the aggravating circumstances existed, and they would have to agree that the aggravating circumstances existed beyond a reasonable doubt. This court cannot determine that the trial court's statement misled the jury. Defendant is not entitled to relief on this issue.

**21. Questioning of potential juror regarding her opinion of mental health as mitigation evidence in the case of State v. Coe**

Defendant next contends that the trial court erred in refusing to allow questioning of a potential juror on her opinion as to whether she believed it was proper for the attorneys who had represented capital defendant Robert Glen Coe to claim that he was mentally incompetent as a defense to his impending execution. In response to the question, the potential juror responded: "I didn't think anything about that because I didn't know anything about that." The State then objected to further questioning on the grounds of relevancy. The court sustained the objection.

Defendant contends that as a result of the court's limitation on questioning of the potential juror, Defendant was not able to conduct the voir dire in such a manner that would enable him to determine if a potential juror would consider, in good faith, the mitigating circumstance of mental health. However, the court did not limit counsel's ability to question the potential juror on whether she would consider mental health as a mitigating circumstance. Instead, the court refused to allow questioning of the juror on a subject about which the juror had advised she had no knowledge. The court's limitation on defense counsel's questioning of the juror about her knowledge and opinion of the Coe case did not impede Defendant's ability to determine if the potential juror would consider, in good faith, the mitigating circumstance of mental health.



The control of voir dire proceedings rests within the sound discretion of the trial court, and this court will not interfere with the exercise of this discretion unless clear abuse appears on the face of the record. State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993), *cert. denied*, 510 U.S. 1215, 114 S. Ct. 1339, 127 L. Ed. 2d 687 (1994). Defendant has failed to demonstrate an abuse of discretion by the trial court on this issue, and therefore is not entitled to relief on this issue.

## **22. Failure to excuse juror Judy Reynolds for cause**

Defendant asserts that the trial court should have excluded juror Judy Reynolds for cause. In response to the juror questionnaire, Ms. Reynolds stated that she strongly favored the death penalty and that she would have difficulty in imposing a sentence of life or life without the possibility of parole in a murder case. Ms. Reynolds explained that if a person was in his right mind and knew what he was doing, then she would be in favor of imposing the death penalty. However, she also explained that she would listen to the facts of the case, and if the aggravating factors did not outweigh the mitigating factors, she could consider both the sentences of life and life without the possibility of parole. She further explained that she could follow the law and her oath as a juror.

Defense counsel also asked Ms. Reynolds about her views on the death penalty, and she again explained that she was in favor of the death penalty. However, upon further questioning by defense counsel, Ms. Reynolds stated that she would consider mitigating factors in making a decision on the appropriate sentence and would consider the sentences of life and life without the possibility of parole. In response to questioning by the State, Ms. Reynolds again confirmed that she would listen to all of the evidence, weigh both aggravating and mitigating circumstances, and consider sentences of life and life without the possibility of parole. Defense counsel did not challenge juror Reynolds immediately following her individual voir dire. However, the defense did later challenge Ms. Reynolds. At that time, the trial court denied the challenge for cause. The trial court ruled that Ms. Reynolds could follow her oath as a juror and determined that Ms. Reynolds would be an appropriate juror for the case.

In determining when a prospective juror may be excused for cause because of his or her views on the death penalty, the standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Austin, 87 S.W.3d 447, 472 -73 (Tenn. 2002) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). "[T]his standard likewise does not require that a juror's biases be proved with 'unmistakable clarity.'" Id. at 473. However, the trial judge must have the "definite impression" that a prospective juror could not follow the law. State v. Hutchinson, 898 S.W.2d 161, 167 (Tenn. 1994)(citing Wainwright v. Witt, 469 U.S. at 425-26, 105 S. Ct. at 853). Finally, the trial court's finding of bias of a juror because of his or her views concerning the death penalty are accorded a presumption of correctness, and the defendant must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision. State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989), *cert. denied*, 493 U.S. 1036, 110 S. Ct. 1758 (1990).

After reviewing the answers and responses of Judy Reynolds, we conclude that the trial court did not err in failing to exclude her for cause. Ms. Reynolds was extensively questioned as to whether she could apply the law to the evidence and consider all forms of punishment in this case. She responded that she would be able to do so. Defendant is not entitled to relief on this issue.

**23. Questioning of prospective jurors as to whether they believed the death penalty is a “moral function” of the government**

During voir dire, the State asked potential jurors if they believed the death penalty was an “appropriate and moral function of the government in certain first degree murder cases as set out by law.” Defendant contends that the trial court erred in allowing this question to be asked because the question implies that a juror who will not return a death sentence is immoral. However, Defendant did not object to this question. Accordingly, Defendant has waived appellate consideration of this issue. See State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999) (citing Tenn. R. App. P. 36(a)); State v. Green, 947 S.W.2d 186,188 (Tenn. Crim. App. 1997). Moreover, the scope and extent of voir dire is entrusted to the discretion of the trial court, and a trial court’s rulings will not be reversed on appeal absent an abuse of discretion. State v. Smith, 993 S.W.2d 6, 28 (Tenn. 1999). Defendant has failed to show an abuse of discretion by the trial court; therefore, he is not entitled to relief on this issue.

**24. Questioning of prospective jurors regarding what they had learned about eyewitness identification from watching television**

During the group voir dire in this case, defense counsel attempted to ask a member of the panel what he had learned about eyewitness identification from watching television shows. The defense had included a similar question on the juror questionnaire. The State objected to the question during voir dire, and the court sustained the objection. In making its ruling, the court explained that the question was irrelevant to the potential juror’s qualification to sit on the jury. The court further explained that the defense’s question could elicit responses that would taint the entire panel. The trial court noted in its order denying the motion for new trial that “[t]he relevant inquiry was whether, regardless of each juror’s personal knowledge concerning [eyewitness identification] evidence, he or she could objectively listen to and evaluate it during this trial.”

Rule 24(a) of the Tennessee Rules of Criminal Procedure provides that the trial court “shall permit questioning by the parties for the purposes of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges.” As previously set forth, however, the scope and extent of voir dire is entrusted to the discretion of the trial court, and a trial court’s rulings will not be reversed on appeal absent an abuse of discretion. Smith, 993 S.W.2d at 28.

The trial court allowed the defense to inquire about the potential jurors’ knowledge of eyewitness identification on the questionnaire. Moreover, the court allowed counsel to ask potential jurors if they had learned anything outside of the courtroom that would affect their ability to consider eyewitness testimony fairly and impartially. Defense counsel also asked the panel numerous

questions on the issue of eyewitness identification. Defendant asserts that by asking the potential juror what he had learned through watching television shows, counsel was merely attempting to make sure that the juror had not viewed programs that depicted eyewitness identifications as infallible or immune from error. After a review of the voir dire, we conclude that defense counsel was not restricted from asking about whether potential jurors believed or had learned from an outside source that identifications are infallible or immune from error. In fact, defense counsel announced to the panel that she wanted to ask a general question, which she stated as follows: "Is there anybody here who believes that people never make mistakes in recognizing other people? Is there anybody here who believes that?" No one from the panel responded affirmatively. The trial court's refusal to allow questioning of a potential juror as to his viewing of a television show that included the subject of eyewitness identification was not error. Defendant has failed to show that the trial court erred in this ruling, and is therefore not entitled to relief on this issue.

## **25. Questioning of witness Jose Gonzales regarding the color of the perpetrator's gun**

Witness Jose Gonzales required the use of an interpreter at trial. Mr. Gonzales, a Spanish speaking native of Mexico, was assisted by an interpreter from Puerto Rico. During the State's case-in-chief, the prosecutor questioned Gonzales about the color of the gun used during the homicides. Gonzales, through his interpreter, responded that the gun was a "gold-type color." The prosecutor asked two follow up questions, inquiring as to whether the gun was shiny like gold or had a gold tint. Each time, Gonzales responded that it was a gold or gold-like color. The prosecutor subsequently asked the interpreter to ask Gonzales to describe the difference in silver and gold. At that point, the defense objected, arguing that the question of the color of the gun had been asked and answered. The prosecutor explained that he believed there might be a problem in the translation between the Mexican witness and the Puerto Rican interpreter. The prosecutor stated he wanted to ask one clarifying question. The judge then allowed the following question: "Could you ask, the question is, what is silver in Mexico; what is silver in Mexico versus gold in Mexico?" Gonzales responded: "I call silver a gold color."

Defendant contends that the issue of the color of the gun was crucial because witness Robert Bolin testified that the gun he had sold to Defendant was "nickel-plated." Defendant asserts that Gonzales did not refer to the color silver until the State suggested the proper answer in its question. Accordingly, Defendant contends that the trial court erred in allowing the repetitive questioning regarding the color of the gun.

It is the longstanding principle that the "propriety, scope, manner and control of examination of witnesses is within the trial court's discretion and will not be interfered with in the absence of an abuse of discretion." State v. Harris, 839 S.W.2d 54, 72 (Tenn. 1992). In the order denying the motion for new trial, the trial court explained that Gonzales had previously expressed concern that his thoughts were not being accurately conveyed at times due to variations among the dialects of his Spanish speaking interpreters. Moreover, this court cannot conclude that the trial court's allowance of a clarifying question results in prejudicial error, especially in light of the fact that the defense fully cross-examined Gonzales and highlighted his previous testimony that the color of the gun was a

golden color. Defendant has failed to show an abuse of discretion by the trial court. Defendant is not entitled to relief on this issue.

## **26. Admission of photograph of defendant**

Exhibit 2 to Defendant's trial is a photograph of Defendant standing in front of a black automobile. In the photograph, Defendant is wearing a pair of black tennis shoes. Witness Jose Gonzales testified that the shoes worn by Defendant in the photograph were similar to the shoes he wore on the night of the robbery and murders at McDonald's. The photograph was admitted over the objection of the defense. Specifically, the defense contended at trial and contends on appeal that the photograph should not have been admitted into evidence because the photograph does not clearly depict a pair of shoes, and the admission of the photograph was, therefore, error. Defendant further argues that the photograph should have been excluded pursuant to Tennessee Rule of Evidence 403, which reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Defendant argues that the photograph at issue is not admissible because it does not clearly depict a pair of shoes, and that, even if it did, there was no way that Gonzales could state with certainty that the shoes in the photograph were the same shoes worn by the perpetrator.

It is within a trial court's discretion to admit photographic evidence at trial, and this court will not reverse the trial court's determination absent an abuse of discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). However, before a photograph may be admitted into evidence, the relevance of the photograph must be established, and the probative value of the photograph must outweigh any prejudicial effect. State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993). We conclude that the photograph was relevant to the description of Defendant on the night in question, and we further determine that the admission of the photograph was not outweighed by any prejudicial effect. The photograph at issue is a clear depiction of Defendant wearing a pair of black tennis shoes. We cannot determine that the trial court erred in allowing the admission of the photograph. Defendant has failed to show that the photograph was not relevant to Gonzales' description of Defendant or that the admission of the photograph was error under Rule 403. Defendant is not entitled to relief on this issue.

## **27. Impeachment of witness Gonzales with transcript of preliminary hearing**

Defendant contends that the trial court committed reversible error when it denied defense counsel's request to impeach Gonzales with his testimony at the preliminary hearing. At the preliminary hearing, Gonzales testified that Defendant's hair was black and it came out of the baseball cap he was wearing on both the sides of the cap and in the back. During Gonzales' cross-examination at trial, he testified that the man at the restaurant on the night in question had hair coming out of the sides of the baseball cap. He further testified that he did not recall having said that the perpetrator's hair extended from the back of the cap and that as he recalled, the hair was only coming out from the sides of the cap. The defense, however, had Gonzales view the composite

sketch, and Gonzales admitted that he had assisted the police in the formulation of the sketch. Gonzales admitted that the man pictured in the sketch had hair coming out of the back of the baseball cap. Moreover, defense counsel asked: “But you did see hair coming out of the back of the head,” and Gonzales responded: “Yes, coming out of the baseball cap.” Thereafter, the defense requested that it be permitted to cross-examine Gonzales with his testimony at the preliminary hearing. The defense specifically requested that it be permitted to show the transcript to Gonzales to show him exactly what his testimony had been at the preliminary hearing. The trial court denied the request.

In denying defense counsel’s request, the court explained that the transcript was produced in English, and it had not been established that Gonzales could read English. Moreover, there was not a verbatim transcription of Gonzales’ words at the preliminary hearing. Instead, there was a transcription of the interpreter’s translation of what Gonzales said.

The propriety, scope, manner and control of cross-examination of witnesses lies within the discretion of the trial court. State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995)(citing Coffee v. State, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948); Davis v. State, 186 Tenn. 545, 212 S.W.2d 374, 375 (1948)). This court will not disturb the limits placed upon the cross-examination by the trial court, unless the trial court has unreasonably restricted the right. Id. (citing State v. Fowler, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (1963); State v. Johnson, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984)). We cannot conclude that the trial court unreasonably restricted the cross-examination of Gonzales when it denied the defense’s request to impeach him with his testimony at the preliminary hearing. As the trial court noted, there was no proof that the witness would have been able to read the English transcript to either confirm or deny that he made the statement as set forth in the transcript. Moreover, Gonzales admitted during cross-examination by the defense that the composite sketch depicted the perpetrator with hair coming out of the back of the baseball cap. He also admitted that he saw hair coming out of “the back of the head.” Defendant has failed to show that he was prejudiced by the court’s denial of cross-examination of Gonzales with the use of the preliminary hearing testimony. Defendant is not entitled to relief on this issue.

## **28. Re-cross Examination of witness Gonzales**

On redirect examination of witness Gonzales, the State questioned Gonzales about the length of Defendant’s hair on the night of the murders as opposed to the length of his hair the first time he saw Defendant in court after his arrest. During re-cross by the defense, counsel attempted to introduce a photograph of Defendant for the purpose of asking if Defendant’s hair in the photograph is different from the hair of the man Gonzales encountered at McDonald’s on the night of the robbery and murders. The trial court denied Defendant’s request to cross-examine Gonzales with the photograph. The trial court ruled that such questioning of Gonzales was not proper for re-cross examination. The court further advised that counsel could have introduced the photograph during its cross-examination of Gonzales. The trial court explained that the prosecutor’s redirect examination of Gonzales regarding the length of Defendant’s hair on the night in question and in court did not open the door for the questioning and introduction of the photograph as proposed by defense counsel.

As set forth *supra* the propriety, scope, manner and control of cross-examination of witnesses lies within the discretion of the trial court, and this court will not disturb the limits placed upon the cross-examination, unless the trial court has unreasonably restricted the right. State v. Dishman, 915 S.W.2d at 463. Defendant has not shown how he was prejudiced by the trial court's ruling on this issue. Further, after a review of the record before us, we cannot conclude that the trial court committed reversible error in its refusal to allow the questioning and introduction of the photograph as requested by Defendant. Defendant is not entitled to relief on this issue.

## **29. Crime scene video**

Defendant contends that the trial court erred in admitting into evidence the videotape of the crime scene. Defendant contends that the videotape was cumulative of testimony of other witnesses. Specifically, defendant contends that the videotape was not necessary to establish the position of the bodies or the description of the crime scene. Defendant further contends that the depiction of the crime scene in the videotape was "gruesome and graphic" and thus prejudicial. Defendant submits that the only purpose of the video was to inflame and prejudice the jury against him.

The admissibility of a videotape of a crime scene is within the sound discretion of the trial judge, and his or her ruling on admissibility will not be disturbed on appeal absent a clear showing of an abuse of that discretion. State v. Carruthers, 35 S.W.3d at 576-57, *cert. denied*, 533 U.S. 953 (2001); State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978); *see also* State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), *cert. denied*, 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994). As the Supreme Court stated in Carruthers, the modern trend is to vest more discretion in the trial judge's rulings on admissibility. Carruthers, 35 S.W.3d at 577 (citing State v. Banks, 564 S.W.2d at 949; State v. Bailey, No. 01C01-9403-CC-00105, 1995 WL 424996 (Tenn. Crim. App., Nashville, July 20, 1995); *perm. app. denied*, (Tenn. Jan. 8, 1996).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. Prejudicial evidence is not excluded as a matter of law. Carruthers, 35 S.W.3d at 577 (citing State v. Gentry, 881 S.W.2d 1, 6 (Tenn. Crim. App. 1993)). The court must still determine the relevance of the visual evidence and weigh its probative value against any undue prejudice. *Id.* The term "undue prejudice" has been defined as "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Banks, 564 S.W.2d at 950-51.

In Banks, the Supreme Court gave the trial courts guidance for determining the admissibility of relevant photographic evidence. A trial court should consider: the accuracy and clarity of the picture and its value as evidence; whether the picture depicts the body as it was found; the adequacy of testimonial evidence in relating the facts to the jury; and the need for the evidence to establish a *prima facie* case of guilt or to rebut Defendant's contentions. Banks, 564 S.W.2d at 951. In this

case, the trial court found that the video was relevant to show the position of the victims, to give an accurate description of the crime scene, to corroborate the testimony of Gonzales, to show the location of the victims' hats, to show the location of the shell casings, and to show intent. The court further found that the probative value of the videotape was not substantially outweighed by the danger of unfair prejudice. Defendant advances the argument that the video was graphic and gruesome, but the only contention he makes in this regard is that the video shows the bloody bodies of the victims as they were found at the crime scene and items left behind by medical personnel who rendered aid to Brown and Gonzales before transporting them to the hospital. The crime scene video of most homicides will necessarily depict the bodies of the victims as they were found and the blood of the victims. If this court were to accept defendant's argument in this regard, no crime scene videotapes of murders would ever be admissible.

This court further concludes that while the videotape and the other evidence admitted in this case may have contained some of the same material, it was not error to admit the videotape. See State v. Bigbee, 885 S.W.2d 797, 807 (Tenn. 1994), holding that it was not error to admit a videotape of the crime scene although it depicted images similar to those of photographs also admitted. Each of the different forms of evidence admitted in this case served different purposes and were probative of the issues to be decided by the jury. As a result, the trial court did not abuse its discretion in admitting the videotape into evidence. See id.; see also State v. Lee, No. 02C01-9603-CC-00085, 1997 WL 686258, \*9 (Tenn. Crim. App., Jackson, Nov. 5, 1997), *perm. app. denied*, (Tenn. Aug. 3, 1998). The probative value of the video of the crime scene is not outweighed by the danger of any unfair prejudice.

Defendant is not entitled to relief on this issue.

### **30. Photograph of crime scene**

Defendant moved pretrial to exclude all still photographs of the crime scene. The court denied the motion, ruling that prior to the introduction of any photograph the State must give notice so that a hearing could be held outside the presence of the jury to determine admissibility. At trial, the court allowed the State to introduce a still photograph of the crime scene, which depicts blood at the scene and bloody footprints. Defendant contends that the admission of this photograph was error.

As set forth *supra*, it is within the trial court's discretion to admit photographic evidence at trial, and this court will not reverse the trial court's determination absent an abuse of discretion. Banks, 564 S.W.2d at 949. In its order denying the Defendant's motion for new trial, the court found that the photograph was not particularly gruesome, it assisted paramedic Randy Stratton with his testimony that the area where Jose Gonzales was found was small and there was virtually no way for paramedics to attempt to save Gonzales' life without contaminating the scene, it was relevant to the State's theory that unidentified bloody prints discovered at the scene were likely those of emergency personnel as opposed to the perpetrator, and its relevance was not substantially outweighed by the danger of unfair prejudice.

After a review of the record, we conclude that the trial court did not err in allowing the introduction of the photograph. While it depicts blood at the scene, we conclude that the photograph is not particularly gruesome. Moreover, we also agree that the photograph assisted witness Randy Stratton in his testimony. The probative value of the photograph is not substantially outweighed by the danger of unfair prejudice. Accordingly, Defendant is not entitled to relief on this issue.

### **31. Photographs of defendant with various hair lengths**

During the testimony of Detective Postiglione, the State submitted for evidence a collection of photographs that depicted Defendant with various hair lengths. Defendant contends that the admission of the photographs was error because some of the photographs dated back to 1996 and, therefore, were not relevant to the time period at issue, spring and summer of 1997. Defendant further contends that the State offered proof that Defendant had altered the length of his hair during the relevant time period. Therefore, Defendant asserts that the admission of this cumulative evidence was irrelevant.

The trial court determined in its order denying the motion for new trial that the exact length of the Defendant's hair at the time in question was unknown. Therefore, through the photographs, the State "invited the jurors to observe the defendant's appearance with hair of various lengths and decide if his appearance could have been consistent with that of the perpetrator." The court specifically found that the probative value of the photographs was not outweighed by the danger of unfair prejudice.

After reviewing the photographs, the record in general, and Defendant's arguments, we cannot conclude that the trial court erred in allowing the collection of photographs to be introduced into evidence. The photographs were relevant to the issue of Defendant's appearance as compared to that of the perpetrator. Defendant has failed to show how the relevance of the photographs were substantially outweighed by the danger of unfair prejudice. Further, Defendant has failed to demonstrate that the trial court abused its discretion in permitting the photographs to be admitted. Accordingly, this court cannot reverse the trial court on this issue. See Banks, 564 S.W.2d at 949.

### **32. Questioning of witness Robert Bolin**

Robert Bolin, whose father lived in the same boarding house as Defendant, testified that in January 1997, Defendant asked him to obtain a .25 automatic handgun. Defendant advised that he wanted the handgun for his personal protection. Bolin explained that he was a truck driver and met Defendant through his father. Mr. Bolin sold Defendant two .25 automatic handguns during January 1997. The first handgun was a Davis .25 automatic, which Bolin described as nickel-plated with black handle grips. After selling Defendant the first handgun, Bolin testified that Defendant requested another handgun. The second handgun was also a .25 automatic, which was nickel-plated with pink handles. Further, Mr. Bolin testified that he gave Defendant a box of ammunition that came in a green and yellow box, but he could not recall the brand of the ammunition.



During the cross-examination of witness Robert Bolin, the defense asked Bolin if there had been extensive media coverage of the McDonald's murders in Nashville. Bolin responded that he assumed there had been, but because he drove a truck, he was not in Nashville a lot. The defense then sought to ask Mr. Bolin if he had ever seen the composite sketch of the perpetrator and if so, if he believed the sketch resembled Defendant. The trial court instructed the defense not to ask the question because counsel did not know the response to the question, and it was possible that his response might include a reference to one of the Defendant's other trials, which would cause a mistrial. The trial court concluded that any probative value of the response was "greatly outweighed by the possibility that Bolin would cause a mistrial by mentioning the unrelated murders." Defendant submits that the trial court should have allowed a jury-out hearing on the issue, but he did not make such a request at trial.

The trial court ruled pre-trial that no mention of Defendant's previous cases could be referenced at this trial. Accordingly, the court appears to have had concerns that the questioning regarding the media's extensive coverage of the McDonald's murders could lead into the witness's discussion of the media coverage in the Captain D's and Baskin Robbins's murders. The trial court ultimately concluded that the questioning was excluded by Rule of Evidence 403. Rule of Evidence 403 excludes evidence if the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Defendant did not request a jury-out hearing to make an offer of proof on this issue; therefore, the answer to defense counsel's question of whether Bolin had seen the sketch remains a mystery. Further, counsel expressed interest in knowing whether Bolin believed the sketch looked like Defendant. Again, however, no offer of proof was made; therefore, the question remains unanswered. In the absence of an offer of proof on this issue, Defendant cannot show that he was prejudiced by the trial court's ruling. Accordingly, we conclude that any error by the trial court on this issue was harmless. See Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

### **33. Testimony of Bernie Billingsley**

Bernie Billingsley testified that he became acquainted with Defendant in early 1997, while working out at Hermitage Fitness Center. He testified that in March 1997, after Defendant overheard him talking with other members of the fitness club about the stock market, Defendant approached him for financial advice. Defendant advised that he had \$3,000 he wanted to invest and asked Mr. Billingsley's advice on how he should invest the money. Mr. Billingsley advised that he should invest the money in a mutual fund. When he saw Defendant a few weeks later, Defendant advised that he had invested the money in a mutual fund.

Defendant contends that the trial court erred in permitting Billingsley's testimony because it impermissibly reflects upon Defendant's financial condition. We have previously concluded that the trial court did not err in permitting the limited proof of Defendant's financial condition. We further hold that the trial court did not err in permitting the testimony of Mr. Billingsley, as it was

relevant to show that although Defendant had been unemployed since February, he had either acquired or intended to acquire \$3,000 and was seeking advice on how to invest the money. The relevance of this testimony was not outweighed by the danger of unfair prejudice. See Tenn. R. Evid. 403.

Defendant is not entitled to relief on this issue.

**34. Trial court's refusal to instruct jury that it could convict defendant of premeditated murder or felony murder, but not both**

Defendant contends that the trial court should have instructed the jury it could convict him of premeditated murder or felony murder, but not both. Defendant concedes, however, that the Supreme Court rejected this argument in State v. Cribbs, 967 S.W.2d 773, 787-88 (Tenn. 1998). Therefore, Defendant asserts this issue strictly for the purpose of preserving it for further review. Accordingly, Defendant is not entitled to relief on this issue.

**35. Instruction to jury that punishment for the crime of first degree murder would be considered at separate sentencing hearing if Defendant was found guilty**

Defendant contends that a portion of the court's instructions to the jury should have been deleted. Specifically, Defendant asserts that the jury should not have been instructed during the guilt-innocence phase of the trial that a separate sentencing hearing would be held if the jury found Defendant guilty of first degree murder. The trial court instructed the jury pursuant to Tennessee Pattern Jury Instruction 7.01(b) and 7.03(b) as follows:

If you so find, then it shall be your duty after a separate sentencing hearing to determine whether the defendant will be sentenced to death, life imprisonment without the possibility of parole, or life in prison, but you will not consider punishment for this offense at this time.

Defendant argues that the above-quoted portion of the jury charge was improper despite the fact that it was technically accurate, because the instruction had the possibility of diverting the jury's attention from their sole task during that proceeding, which was to determine Defendant's guilt or innocence. However, this court has held that a trial court's failure to instruct the jury as to its role in punishing the defendant in a separate sentencing hearing if they found Defendant guilty of first degree murder necessitated a new trial. State v. Fuino, 608 S.W.2d 892, 895 (Tenn. Crim. App. 1980). In Fuino this court specifically ordered the trial court to instruct the jury as to their duty to fix punishment after a separate sentencing hearing in the event of a verdict of first degree murder on remand. Id. at 896. Accordingly, the trial court did not err in giving the contested instruction. Defendant is not entitled to relief on this issue.

### **36. Use of styrofoam heads by Dr. Levy as demonstrative evidence**

During Dr. Bruce Levy's testimony, he used styrofoam heads to demonstrate, with a pen, the head wounds suffered by the victims. Defendant objected to the use of the demonstrative evidence, contending that the heads were unduly prejudicial. Defendant made this argument in the appeal of his Montgomery County convictions, and this court rejected his challenge. The Supreme Court has affirmed our conclusion that the use of styrofoam heads by the medical examiner was not error. Reid, 2005 WL 1219263, at \* \_\_\_\_\_. In rejecting Defendant's argument this court stated, and our Supreme Court has agreed with the following:

This court approved the use of this type of demonstrative evidence in State v. Robert E. Cole, No. 02C01-9207-CR-00165, 1993 WL 539185, \*3 (Tenn. Crim. App., Jackson, Dec. 30, 1993). In Cole, this court concluded that the evidence was "highly probative as to the issues to be decided by the jury. Under the circumstances, the trial court did not err in admitting the challenged evidence." Id. (citing State v. King, 718 S.W.2d 241 (Tenn. 1986); State v. Sexton, 724 S.W.2d 371 (Tenn. Crim. App. 1986)).

This court cannot find that the use of the styrofoam heads was inappropriate in this case as the appellant urges. The trial court did not err in its ruling that the use of the styrofoam heads would assist [the medical examiner] in demonstrating the location of the wounds. This issue is without merit.

Reid, 2005 WL 1219263, at \* \_\_\_\_.

The trial court in this case specifically found that the styrofoam heads would assist Dr. Levy in demonstrating the location of the victims' wounds. This court cannot determine that the trial court erred in allowing the use of the demonstrative evidence. Defendant is not entitled to relief on this issue.

### **37. Recall of witness Robert Bolin by the State**

The trial court allowed the State to recall witness Robert Bolin to correct his earlier testimony. Mr. Bolin had testified at trial that he sold Defendant a Larsen .25 automatic handgun. After his testimony, the witness reviewed an earlier police report and realized that he had misstated the brand of the handgun during his testimony at trial. The defense objected to the recall of witness Bolin. However, the trial court allowed the recall of Mr. Bolin for the limited purpose of clarifying his misstatement as to the brand of the handgun. The court allowed the recall because Mr. Bolin was correcting his testimony as to the brand of the gun, but was not adding to his testimony. On recall, Mr. Bolin testified that the handgun he sold to Defendant was not a Larsen handgun, but was a Raven handgun.

Defendant contends that the trial court's action in permitting the recall of Mr. Bolin had the effect of allowing him to be a more credible witness than he actually was. Moreover, Defendant contends that the recall of Mr. Bolin must be compared to his request to recall Dr. Caruso at the competency hearing. However, the recall of witness Bolin differed greatly from the requested recall of Dr. Caruso. First, Mr. Bolin was a lay witness who made a misstatement on the stand. Dr. Caruso was an expert who had been compensated for his opinions and had provided his opinions in a written report. Second, Mr. Bolin merely needed to correct his testimony on the stand as to the brand of handgun he sold to Defendant. Dr. Caruso, however, would have been required to amend his expert report and alter the basis of his expert opinions. Furthermore, the trial court found that the circumstances surrounding the requested recall of Dr. Caruso were suspicious and lacking in credibility. No such finding was made as to witness Bolin.

The trial court has discretion in determining whether it will allow a party to recall a witness, and it does not constitute error absent an abuse of discretion. State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993); Lillard v. State, 528 S.W.2d 207, 212 (Tenn. Crim. App. 1975). We cannot conclude that the trial court abused its discretion in allowing the State to recall Robert Bolin. Defendant is not entitled to relief on this issue.

### **38. Constitutionality of Tenn. Code Ann. Sec. 39-13-204**

Defendant asserts that Tennessee Code Annotated Section 39-13-204 is unconstitutional. He asserts multiple challenges to the death penalty statutes, but acknowledges that the constitutional challenges he asserts have been decided adversely to him by the Supreme Court. He raises this issue merely to preserve it for later review.

The death penalty statutes have repeatedly been held constitutional. See e.g., State v. Reid, 91 S.W.3d 247, 313 (Tenn. 2002); State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), *cert. denied*, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001); State v. Nesbit, 978 S.W.2d 872, 902 (Tenn. 1998), *cert. denied*, 526 U.S. 1052, 119 S. Ct. 1359, 143 L. Ed. 2d 520 (1999); State v. Vann, 976 S.W.2d 93, 117 (Tenn. 1998), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551 (1999); State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536 (1998); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Bigbee, 885 S.W.2d 797, 813-14 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 21-22 (Tenn.), *cert. denied*, 510 U.S. 996, 114 S. Ct. 561, 126 L. Ed. 2d 461 (1993); State v. Bane, 853 S.W.2d 483, 488 (Tenn. 1993); State v. Harris, 839 S.W.2d 54 (Tenn. 1992).

Accordingly, Defendant is not entitled to relief on this issue.

### **39. Admission of victim impact evidence**

Defendant next contends that the trial court erred in denying his motion to exclude all victim impact evidence. Specifically, defendant argues that State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998), the case allowing victim impact testimony, had not been decided at the time of the crimes at issue;

therefore, allowing victim impact testimony in this case would constitute a violation of Defendant's right to be free from ex post facto laws. Defendant acknowledges that the Supreme Court rejected this precise issue against him in State v. Reid, 91 S.W.3d 247 (Tenn. 2002), but asserts it for the purpose of preserving it for later review. Defendant is not entitled to relief on this issue.

**40. Use of “mass murder” aggravating circumstance when defendant had not been convicted of other murders at the time of the commission of the crimes in this case**

Pretrial, Defendant moved to strike the “mass murder” aggravating circumstance relied upon by the State. Defendant argued that because the State intended to use the Captain D's murders to establish this aggravator and those crimes had not been adjudicated at the time the McDonald's crimes were committed, use of the “mass murder” aggravator would constitute a violation of the constitutional protections against ex post facto laws. The trial court denied Defendant's motion.

On appeal, Defendant admits that the Supreme Court has not required prior murders in a series to be adjudicated before the subsequent murder is committed in order for the “mass murder” aggravator to apply, see State v. Smith, 868 S.W.2d 561, 581 (Tenn. 1993); State v. Black, 815 S.W.2d 166, 183-84 (Tenn. 1991), but he seeks to preserve the issue for further review. Defendant is not entitled to relief on this issue.

**41. Admission of evidence of the Captain D's murders to establish the “mass murder” aggravating circumstance**

During the penalty phase of trial, the court allowed the State to introduce evidence to show that the Captain D's murders and the McDonald's murders were perpetrated in a similar fashion in a common scheme or plan for the purpose of establishing the “mass murder” aggravating circumstance, Tenn. Code Ann. § 39-13-204(i)(12). In contrast, the trial court ruled that evidence of the Captain D's murders was not admissible in the guilt phase of trial on the issue of the perpetrator's identity. The court made this ruling based on its finding that the probative nature of the evidence was outweighed by the unfairly prejudicial effect it would have upon the jury. The court explained: “[I]f the jury heard that the defendant killed two other individuals who also worked in a fast food restaurant, it would be difficult, if not impossible, for the jury to follow the Court's instructions to use that information only to decide the issue of identity, and not as propensity evidence.”

Although Defendant asserts that the trial court excluded the Captain D's evidence during the guilt phase because the court found that the murders at Captain D's and McDonald's were not part of a common scheme or plan, such assertion is simply unfounded. The trial court was very specific that it excluded the evidence of the Captain D's crimes after balancing the prejudicial effect it would have on the jury on the issue of identity during the guilt phase, as required by Tennessee Rule of Evidence 404(b). The standard for the admission of evidence to establish an aggravating circumstance is quite different. Tennessee Code Annotated Section 39-13-204(c) provides that at the sentencing hearing “any evidence tending to establish or rebut the aggravating circumstances

enumerated in subsection (i)” may be introduced. That section of the Code also provides that “any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted.” Tenn. Code Ann. § 39-13-204(c).

At the time the murders at issue were committed, the mass murder aggravating circumstance was defined as follows: “ the murder of three (3) or more persons within the state of Tennessee within in a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.” Tenn. Code Ann. § 39-13-204(i)(12)(Supp. 1996). The State cited to fourteen similarities between the Captain D’s crimes and the McDonald’s crimes to establish that the crimes were committed in a similar fashion in a common scheme or plan. The trial court did not err in permitting Detective Postiglione to testify as to the similarities in the crimes to establish the mass murder aggravating circumstance. Defendant is not entitled to relief on this issue.

#### **42. “Avoiding Arrest” aggravating circumstance**

Defendant moved in a pretrial motion to strike aggravating circumstance (i)(6), the “avoiding arrest” aggravator, because it duplicates the elements of the underlying offense and therefore fails to narrow the class of death-eligible offenders in violation of the state and federal constitutions and it duplicates the elements of the (i)(7) aggravator and therefore fails to narrow the class of death-eligible offenders. The trial court denied Defendant’s motion. On appeal, Defendant argues that the trial court erred in denying the motion. However, Defendant acknowledges that the Supreme Court has rejected his arguments. See State v. Bush, 942 S.W.2d 489, 504 (Tenn. 1997) where the Supreme Court approved the use of the (i)(6) aggravator when an offense in addition to a murder occurred and State v. Blanton, 975 S.W.2d 269, 280 (Tenn. 1998) where the Supreme Court approved the use of the (i)(6) and (i)(7) aggravators in the same case. Despite the Supreme Court’s rejection of Defendant’s arguments, he makes them in this appeal for the purpose of preserving the issue for further review. Defendant is not entitled to relief on this issue.

#### **43. Life photographs of victims**

Defendant challenges the introduction of photographs taken of the victims before they were murdered. Defendant asserts that the photographs, introduced during the victim impact testimony, served only to inflame the jurors and appeal to their emotions. The State counters that the photographs were probative of the issue of the impact of the death on the victims’ family members and to show those unique characteristics which provide a brief glimpse into the life of the victims. The Supreme Court has held:

[g]enerally, victim impact evidence should be limited to information to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual’s death, and how those circumstances financially,

emotionally, psychologically or physically impacted upon members of the victim's immediate family.

Nesbit, 978 S.W.2d at 887. In this case, the photographs were introduced to provide a brief glimpse into the lives of the victims, as allowed by Nesbit. Accordingly, the court did not err in allowing the introduction of these photographs. Defendant is not entitled to relief on this issue.

#### **44. Victim impact testimony by family members**

During the penalty phase, Ivette Rivera, wife of Ronald Santiago, testified as to the effect her husband's death had on her life and the lives of her children. In so doing, she discussed the last time she and her children had seen Mr. Santiago. She also testified that her daughter will not allow anyone to call her "princess" because that is the nickname Mr. Santiago had for his daughter. Doyle Brown, Andrea Brown's father, testified as to the difficulties he and his family were having in dealing with his daughter's death. In his testimony he advised that his daughter's room remained exactly the same, and they had kept the car that Andrea bought just before she was killed. He further stated: "It's been real hard to learn that she won't be here anymore." Defendant maintains that these passages of testimony exceed the permissible scope of victim impact evidence.

Defendant did not object to the testimony by either Ivette Rivera or Doyle Brown; therefore, this issue is waived. See State v. Thornton, 10 S.W.3d 229, 234 (Tenn. 1999)(citing Tenn. R. App. P. 36(a)); State v. Green, 974 S.W.2d at 188. Further, we find that the testimony by Ms. Rivera and Mr. Brown was proper victim impact testimony under Nesbit, 978 S.W.2d at 879. Accordingly, Defendant is not entitled to relief on this issue.

#### **45. Non-statutory mitigating circumstances**

Defendant requested that the trial court instruct the jury as to twenty-four specific non-statutory mitigating circumstances. Defendant asked that the non-statutory mitigators be charged verbatim. The trial court denied Defendant's request. Instead, the court instructed the jury on eleven general categories of mitigating circumstances. Defendant contends that the trial court erred in charging the general non-statutory mitigators, but admits that the trial court's instruction complied with current case law.

The Supreme Court affirmed the trial court's denial of a similar request made by Defendant in his appeal of his convictions of the Captain D's murders. In that case, Defendant requested that the trial court instruct the jury as to twenty-eight specific non-statutory mitigating circumstances. Reid, 91 S.W.3d at 305. In affirming the trial court's denial of Defendant's request for the twenty-eight non-statutory mitigators, the Supreme Court relied on State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996), where the court had held that instructions on non-statutory mitigating circumstances must not be fact specific and thereby imply to the jury that the court had made a finding of fact in contravention of Article VI, Section 9 of the Tennessee Constitution. The Reid Court determined that the trial court had not erred in providing instructions to the jury, as it had provided non-statutory

mitigating circumstances drafted in general categories, which were drafted in a similar style to the statutory mitigating circumstances and were substantially the same as the instructions requested by Defendant. Reid, 91 S.W.3d at 307.

In this case, the trial court complied with Tennessee case law in charging the jury with the eleven general non-statutory mitigating circumstances. The mitigating circumstances were drafted in a style similar to the statutory circumstances, they embodied the requests made by Defendant, and they reflected the proof presented during the sentencing hearing. Accordingly, the trial court did not err in this regard. Defendant is not entitled to relief on this issue.

**46. Jury instruction on victim impact testimony**

As previously set forth, Defendant filed a motion to exclude all victim impact evidence. Defendant also challenged the victim impact jury instruction in State v. Nesbit, 978 S.W.2d 872, 892 (Tenn. 1988). The instruction reads as follows:

You may consider the victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt.

Defendant contends that the Nesbit instruction is illogical and that victim impact evidence is irrelevant under the death penalty statute. However, victim impact evidence has been declared constitutional by the United States Supreme Court and the Tennessee Supreme Court. Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1988), *cert. denied*, 526 U.S. 1052 (1999). Furthermore, the argument advanced by defendant that victim impact testimony is irrelevant and should be excluded under Tennessee's current capital sentencing system, has been rejected by the Supreme Court. See State v. Reid, 91 S.W.3d at 282-83, holding that any contradiction between the statute and the Nesbit instruction inures to the benefit of Defendant; therefore, this argument does not entitle Defendant to relief.

**47. Sufficiency of evidence to support jury's finding that aggravating circumstances outweighed mitigating factors beyond a reasonable doubt**

Pursuant to Tennessee Code Annotated section 39-13-206(c)(1)(C), this court must determine whether the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. The proper standard for making this determination is whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the aggravating circumstances outweighed the mitigating



circumstances beyond a reasonable doubt. See e.g., State v. Henderson, 24 S.W.3d 307, 313 (Tenn. 2000).

The jury found four aggravating circumstances following the sentencing hearing: the defendant had previously been convicted of one or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person, Tenn. Code Ann. § 39-13-204(i)(2); the murders were committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of defendant or another, Tenn. Code Ann. § 39-13-204(i)(6); the murder was knowingly committed, solicited, directed or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit robbery, Tenn. Code Ann. § 39-13-204(i)(7); and the defendant committed “mass murder,” which was defined at the time of the commission of the offenses at issue as the murder of three or more persons within the state of Tennessee within a forty-eight month period, and perpetrated in a similar fashion in a common scheme or plan, Tenn. Code Ann. § 39-13-204(i)(12)(Supp. 1996). There is ample evidence to support each of the aggravating circumstances found by the jury.

As mitigation, Defendant presented testimony related to his unstable childhood, several documented brain injuries, Defendant’s brain abnormality, Defendant’s mental health problems, Defendant’s delusional beliefs, and the mental disorders of schizophrenia and anosognosia. As rebuttal, the State presented proof at the sentencing hearing that Defendant’s brain abnormality did not contribute to or cause the murders at issue.

We have carefully reviewed the record and conclude that despite the substantial mitigation proof presented by Defendant, the evidence fully supports the finding of the jury that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.

#### **48. Proportionality Review**

Finally, Defendant contends that the sentence of death in his case is disproportionate to the sentences imposed in similar cases. In reviewing a defendant’s sentence of death for first degree murder, “the reviewing court shall determine whether . . . the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.” Tenn. Code Ann. § 39-13-206.

The Supreme Court has explained comparative proportionality review as follows:

In conducting a comparative proportionality review, we begin with the presumption that the sentence of death is proportional with the crime of first degree murder. State v. Hall, 958 S.W.2d 679 (Tenn. 1997). A sentence of death may be found disproportionate if the case being reviewed is “plainly lacking in circumstances consistent with those in similar cases in which the death penalty has previously been imposed.” Id. citing State v. Ramsey, 864 S.W.2d 320, 328 (Mo. 1993). A sentence

of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which a defendant has received a life sentence. State v. Bland, 958 S.W.2d 651 (Tenn. 1997) (citing State v. Carter, 714 S.W.2d 241, 251 (Tenn. 1986)). Our inquiry, therefore, does not require a finding that a sentence "less than death was never imposed in a case with similar characteristics." Bland, 958 S.W.2d at 665. Our duty "is to assure that no aberrant death sentence is affirmed." Id. (citing State v. Webb, 238 Conn. 389, 680 A.2d 147, 203 (Conn. 1996)).

Our proportionality review is neither a rigid nor an objective test. Hall, 958 S.W.2d at 699. There is no "mathematical formula or scientific grid," and we are not bound to consider only cases in which the same aggravating circumstances were found applicable by a jury. Id.; State v. Brimmer, 876 S.W.2d 75, 84 (Tenn. 1994). This Court considers many variables when choosing and comparing cases. Bland, 958 S.W.2d at 667. Among these variables are: (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on non-decedent victims. Id.; Hall, 958 S.W.2d at 699. Factors considered when comparing characteristics of defendants include: (1) the defendants' prior criminal record or prior criminal activity; (2) the defendants' age, race, and gender; (3) the defendants' mental, emotional or physical condition; (4) the defendants' involvement or role in the murder; (5) the defendants' cooperation with authorities; (6) the defendants' remorse; (7) the defendants' knowledge of helplessness of victim(s); and (8) the defendants' capacity for rehabilitation. Id.

State v. Hall, 976 S.W.2d 121, 135 (Tenn. 1998).

We have compared the circumstances of the present case with the circumstances of similar cases and conclude that the sentence of death in this case is proportionate to the sentences imposed in similar cases. See e.g., State v. Powers, 101 S.W.3d 383 (Tenn.), *cert. denied*, 538 U.S. 1038, 123 S. Ct. 2083, 155 L. Ed. 2d 1071 (2003) (finding aggravating circumstances (i)(2), (i)(6) and (i)(7) and imposing death where defendant shot victim in head and committed aggravated robbery); State v. Reid, 91 S.W.3d 247 (Tenn. 2002), *cert. denied*, 540 U.S. 828, 124 S. Ct. 56, 157 L. Ed. 2d 52 (2003) (finding aggravating circumstances (i)(2), (i)(6) and (i)(7) and imposing death despite evidence of defendant's troubled childhood, multiple head injuries, and brain abnormality where defendant shot and killed two fast food employees during a robbery); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000), *cert. denied*, 532 U.S. 925, 121 S. Ct. 1367, 149 L. Ed. 2d 295 (2001) (finding aggravating circumstances (i)(2) and (i)(7) and imposing death where defendant shot and robbed sixty-nine-year old victim); State v. Smith, 868 S.W.2d 561 (Tenn. 1994), *cert. denied*, 513 U.S. 960, 115 S. Ct. 417, 130 L. Ed. 2d 333 (1994) (finding the (i)(5), (i)(6), (i)(7), (i)(12) aggravating circumstances, and imposing death despite fact that defendant had been hospitalized for depression,

paranoid personality disorder, chronic depressive neurosis and paranoid delusional disorder); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), *cert. denied*, 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994)(death sentence upheld based upon aggravating circumstances (i)(5) and (i)(12) where defendant shot and killed victims during a robbery of a restaurant); State v. Howell, 868 S.W.2d 238 (Tenn. 1993), *cert. denied*, 510 U.S. 1215, 114 S. Ct. 1339, 127 L. Ed. 2d 687 (1994)(finding aggravating circumstance (i)(2) and imposing death where twenty-seven-year-old defendant shot and killed clerk during robbery of convenience store); State v. Harris, 839 S.W.2d 54 (Tenn. 1992), *cert. denied*, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746 (1993) (jury imposed death sentences based upon (i)(2), (i)(5), and (i)(7) aggravating circumstances despite evidence of defendant's lack of education and troubled childhood where thirty-two-year-old defendant murdered two employees of hotel during robbery); State v. King, 694 S.W.2d 941 (Tenn. 1985), (thirty-three-year-old defendant murdered the proprietor of a tavern during the course of a robbery, death sentence upheld based upon aggravating circumstances (i)(2) and (i)(7)); State v. Sample, 680 S.W.2d 447 (Tenn. 1984), *cert. denied*, 470 U.S. 1034, 105 S. Ct. 1412, 84 L. Ed. 2d 795 (finding the (i)(3), (i)(6) and (i)(7) aggravating circumstances and imposing death penalty where two clerks shot to death during robbery); State v. McKay, 680 S.W.2d 447 (Tenn. 1984), *cert. denied*, 470 U.S. 1034, 105 S. Ct. 1412, 84 L. Ed. 2d 795 (1985)(finding the (i)(2),(i)(3), (i)(6) and (i)(7) aggravating circumstances and imposing death penalty where two clerks shot to death during robbery); State v. Harries, 657 S.W.2d 414 (Tenn. 1983)(thirty-one-year-old male defendant shot and killed clerk during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator). We are of the opinion that the penalty imposed by the jury in this case is not disproportionate to the penalty imposed for similar crimes.

## CONCLUSION

In accordance with Tenn. Code Ann. § 39-13-206(c), we have considered the entire record and conclude that the sentence of death has not been imposed arbitrarily, that the evidence supports the jury's finding of the statutory circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and that the sentence is not disproportionate. We have also reviewed all issues raised by Defendant and conclude there is no reversible error. As a result, the judgments of the trial court and the sentences of death imposed by the jury are AFFIRMED.

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THOMAS T. WOODALL, JUDGE